IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GEORGIA PACIFIC CORPORATION, Appellant, v. CARL G. OLSON, Respondent.	No. 39061-2-II UNPUBLISHED OPINION

Armstrong, J. — Georgia-Pacific Corporation appeals from a superior court judgment granting former employee Carl Olson further treatment for his industrial injury, as well as time loss compensation for temporary total disability and attorney fees and costs. Because substantial evidence supports the jury verdict on which the judgment was based, we affirm.

FACTS

In March 1969, when Olson was 15 years old, he accidentally broke both wrists, resulting in reconstructive surgery on his left wrist and the resetting of his right arm bones. By the following September, Olson was playing high school football with only residual numbness in parts of three fingers. In 1975, Olson again injured his left wrist when he fell from a truck. Olson responded well to treatment with a full recovery.

In 1976, Olson began working for Georgia-Pacific's predecessors as a forklift driver. In 1995, he became a journeyman millwright, which required him to fix machinery. He worked with an impact gun and a sledgehammer, which was hard on his wrists. If he had breaks of a few days

between jobs, his wrists would recover, but when he went immediately from one job to the next, they did not. He began having pain in his fingers that spread to his hands, wrists, and forearms. The mill nurse who saw him for the pain referred him to his family physician, Dr. Arthur Gaskell. In Spring 2000, Dr. Gaskell restricted Olson to machinist work and referred him to Dr. Gerald Schoepflin, a rheumatologist.

After Dr. Schoepflin examined Olson in 2001, he diagnosed post-traumatic arthritis in both wrists. Dr. Schoepflin recommended work restrictions that included no repetitive striking or pulling and staying in the machine shop. Olson began wearing fingerless gloves with wrist supports at work and wrist braces at home. Even after he secured a transfer to the machine shop, Olson often had to work as a millwright. When he saw Dr. Schoepflin again, the doctor prohibited him from working as a millwright and restricted him from driving or sweeping for more than minutes at a time.

Olson last worked for Georgia-Pacific in February 2002. He later applied for worker's compensation benefits, claiming that his bilateral wrist condition was attributable to his work at Georgia-Pacific. By order dated April 12, 2006, the Department of Labor and Industries allowed and closed the claim with time loss benefits as paid to December 3, 2004, but with no award for permanent partial disability or a pension for permanent total disability. Olson appealed, contending that he was entitled to further treatment, time loss benefits from December 4, 2004, to April 12, 2006, and to either a pension or a permanent partial disability award as of April 12, 2006. At the Board of Industrial Insurance Appeals' hearing in February 2007, Olson, his wife, and vocational rehabilitation consultant Maureen Devine testified in person. The Board also

considered the deposition testimony of Dr. Schoepflin, Dr. Thomas Gritzka, and Dr. Morris Button.

The Board's appeals judge concluded that Olson needed further treatment but that he was able to work on a regular basis and was not entitled to time loss or pension benefits from December 4, 2004, through and as of April 12, 2006. Georgia-Pacific petitioned for review of the treatment issue, and Olson petitioned for review of the time loss issue. The Board accepted review and concluded that Olson was entitled to further treatment as well as time loss benefits from December 4, 2004, through April 12, 2006.

After appealing to the superior court, Georgia-Pacific moved for judgment as a matter of law, seeking reversal of the Board's decision and reinstatement of the Department's decision. The trial court denied the motion and the matter proceeded to a jury trial. Georgia-Pacific renewed its motion for judgment as a matter of law just before the case was submitted to the jury; the trial court again denied the motion. The trial court's jury instructions included the Board's findings of fact and informed the jury that they were presumed correct.

The jury affirmed the Board's decision that Olson required further treatment and was entitled to time loss benefits due to temporary total disability from December 4, 2004, through April 12, 2006. Because it found that his condition was not yet stable, it did not decide whether Olson suffered from permanent total or permanent partial disability. The trial court entered a conforming judgment and granted Olson attorney fees and costs of $13,278.

I. ANALYSIS

1. Standard of Review

On appeals to the superior court, the Board's decision is prima facie correct and a party attacking the decision must support its challenge by a preponderance of the evidence. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Judicial review is de novo and based solely on the evidence and testimony presented to the Board. *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002). Either party is entitled to a jury trial to resolve factual disputes. RCW 51.52.115; *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 315, 189 P.3d 178 (2008). We limit our review to examining the record to determine whether substantial evidence supports the superior court's decision. *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996); *see also* RCW 51.52.140 (appeal shall lie from the superior court's judgment as in other civil cases).

Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 340, 725 P.2d 463 (1986). Even if we view the evidence differently, we cannot substitute our judgment for the trier of fact's judgment. Where there is disputed evidence, the substantial evidence standard is satisfied if there is any reasonable view that substantiates the trial court's findings, even though there may be other reasonable interpretations. *Garrett Freightlines*, 45 Wn. App. at 340. As we have explained,

> Our function is to review for sufficient or substantial evidence, taking the record in the light most favorable to the party who prevailed in superior court. We are not to re-weigh or re-balance the competing testimony and inferences, or to apply anew the burden of persuasion, for doing that would abridge the right to trial by jury.

Harrison Mem'l Hosp. v. Gagnon, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).[1]

2. Substantial Evidence of Total Disability

Georgia-Pacific argues that there was insufficient evidence to support the finding that Olson was temporarily totally disabled from December 4, 2004, to April 12, 2006, and the award of time loss benefits that followed, because no medical or vocational expert testified that Olson could not perform light or sedentary work of a general nature during the time period specified.

Time loss compensation is available during periods of temporary total disability. *Hunter v. Bethel Sch. Dist.*, 71 Wn. App. 501, 506, 859 P.2d 652 (1993); RCW 51.32.090(1). The insurer must discontinue such payments as soon as earning power is fully restored "at any kind of work." RCW 51.32.090(3)(a); *Hunter*, 71 Wn. App. at 506-07. Thus, temporary total disability terminates as soon as the claimant's condition has become fixed and stable and he is capable of reasonably continuous employment at any kind of generally available work. *Hunter*, 71 Wn. App.

[1] Georgia-Pacific twice moved for judgment as a matter of law and has assigned error to the trial court's denial of those motions. The trial court can grant such a motion only if it finds that, viewing the evidence with all reasonable inferences in favor of the nonmoving party, the evidence is insufficient to support a verdict for the nonmoving party. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). If we find that substantial evidence supports the jury verdict, we have necessarily concluded that Georgia-Pacific was not entitled to judgment as a matter of law. Thus, we do not separately address the error assigned to the trial court's failure to grant Georgia-Pacific judgment as a matter of law.

at 506-07. General work means even light or sedentary work, if it is reasonably

continuous, within the range of the claimant's capabilities, training, and experience, and is available on the competitive labor market. *Young*, 81 Wn. App. at 131. A worker is not totally disabled solely because he is unable to return to his former occupation. *Hunter*, 71 Wn. App. at 506-07.

The worker's compensation act insures against loss of wage-earning capacity. *Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 197, 120 P.2d 1003 (1942). A worker's wage-earning capacity may be destroyed even though he still has some capacity to perform minor tasks. *Kuhnle*, 12 Wn.2d at 197. Sustainable wage-earning capacity is the goal and working in great pain is not sustainable. *Adams v. Dep't of Labor & Indus.*, 128 Wn.2d 224, 233, 905 P.2d 1220 (1995).

A worker can make a prima facie case of total disability if he can establish that he was able to work before the injury and is unable to do so after injury because of pain and the nature of the injury; when medical experts have testified to the loss of function and the limitations on the worker's ability to work; and when vocational experts have concluded that the worker 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). 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*, 81 Wn. App. at 132. The testimony of a vocational expert was unnecessary in *Young* 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.

Young, 81 Wn. App. at 132.

Georgia-Pacific argues that its vocational and medical experts demonstrated that Olson was capable of working during the time in question. Vocational expert Maureen Devine testified that she did not meet Olson but reviewed his records in 2007. She opined that Olson was employable from 2004 to 2006 in positions such as security guard, sales, office clerical, scale operator, and fire watch. Olson's ability to work as a millwright demonstrated that he possessed average to above learning ability, verbal and numerical abilities, spatial perception, finger dexterity, and the ability to work with others. Devine stated that the current economy was excellent and that current job opportunities would have existed during the period in question.

On cross examination, Devine admitted that under the Department's criteria, Olson had no transferable skills and would need retraining to perform the jobs she had identified. She also admitted that a vocational counselor who previously worked on Olson's claim concluded in 2003 that some of the positions Devine mentioned, such as office assistance, were inappropriate based on the limitations his doctors had imposed. She also reviewed a 2004 work assessment report that found substantive evidence to support the opinion that Olson was totally disabled and unable to benefit from vocational services. Finally, Devine acknowledged that Georgia-Pacific did not offer Olson any other type of work, that it paid him time loss benefits through December 3, 2004, and that previous vocational counselors did not provide Olson with any retraining or communicate to him any employment opportunities.

Georgia-Pacific's medical expert, Dr. Morris Button, is a hand surgeon who examined Olson in 2004 and reviewed his subsequent records. He testified that even without surgery, Olson

could do sedentary or light work of a general nature. Although Olson was "significantly limited in his physical capacity," Button opined that he could work in an office setting or security position. Certified Appeal Board Record (CABR), Dep. of Morris Button, M.D., at 19-20.

Olson testified that the vocational counselors who worked with him were unable to identify any job he could perform. He said that he could not have worked between 2004 and 2006 on a regular basis because of his wrist pain. His wife testified that he experiences pain as soon as he attempts to do anything with his hands. Olson can drive for only 10 minutes at a time. Writing by hand aggravates his condition. If he hits his hand against something, it takes several days for the pain to clear. He drops things with either hand without being aware he is doing so. He uses his home computer only to check e-mail because handling the mouse is difficult. The pain often interferes with his sleep. He has several episodes a month when he cannot sleep at night because of pain and consequently cannot function the next day. He gains some relief by using hot and cold compresses, which would be difficult to maintain at work. He testified that he could not have worked from 2004 to 2006 without violating his doctors' restrictions and that his constant pain would have affected his ability to perform any job.

Dr. Schoepflin advised Olson not to perform repetitive gripping of tools or equipment, not to sweep or use a broom for more than 10 minutes a day, not to engage in computer keyboard activities for more than 10 minutes at a time or two hours a day, and not to drive for more than 15 minutes at a time. He testified that Olson reported during a 2004 examination that he could not pour a full gallon of milk or use a manual toothbrush. He added that Olson was unable to work as a millwright from 2004 to 2006. Dr. Gritzka testified that Olson had been temporarily totally

disabled since December 2004 because he was not able to return to his job, which had been his sole occupation since age 22. Dr. Gritzka stated that with surgery to fuse his wrists, Olson could do sedentary work, but that without surgery, he was finished in the workplace.

Georgia-Pacific criticizes this testimony as based on assumption rather than fact because Dr. Gritzka is not a vocational expert, but such criticism would condemn any medical testimony about a patient's work prospects. In arguing in support of its motion for judgment as a matter of law, Georgia-Pacific informed the trial court that a vocational witness was unnecessary if a doctor said there was no kind of work the claimant could do. Dr. Gritzka so testified. Moreover, Georgia-Pacific's vocational expert's testimony was based on its own series of assumptions. Devine never met Olson and did not perform any job market survey pertinent to the time period in question. She assumed when she testified that Olson had certain skills and that the jobs currently available were also available in 2004.

Contrary to Georgia-Pacific's argument on appeal, testimony from a vocational expert, while relevant and admissible, is not essential to establish total disability. Here, Olson, his wife, and his doctors presented compelling evidence of his inability to work. In addition, Devine testified that Olson had no transferable skills and would require retraining for the jobs she had identified. As the Board observed,

> [i]f a worker requires retraining to acquire the skills necessary to become employable, it follows that he is not employable without retraining. There is no evidence that any retraining was offered to Mr. Olson or that any equipment that he might need to accommodate his medical restrictions was made available.

CABR at 5. Assessed in a common sense manner, the evidence is sufficient to uphold the jury's

finding that Olson was temporarily totally disabled from December 4, 2004, to April 12, 2006.

3. Substantial Evidence Conditions Had Not Reached Maximum Medical Improvement

Georgia-Pacific next argues that there was substantial evidence that Olson had refused surgery, which was the only treatment that would improve his wrists, and that the Department's claim closure was appropriate because Olson's wrist condition was fixed and stable.

Claim closure is appropriate when the claimant's condition has become fixed and stable, or when it has reached maximum medical improvement. *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 716-17, 213 P.3d 591 (2009). Where further medical treatment is contemplated, the claim remains open so the worker can receive treatment. *Pybus Steel Co. v. Dep't of Labor & Indus.*, 12 Wn. App. 436, 439, 530 P.2d 350 (1975). If a claimant's condition has stabilized so that no further medical treatment is required, the condition is "fixed" for purposes of closing the claim and determining the disability award. *Pybus Steel Co.*, 12 Wn. App. at 439.

In resolving this issue, the jury considered the Board's finding that surgical treatment was available for Olson's wrists as of April 12, 2006, and that he was entitled to consider that treatment option. The industrial appeals judge had also concluded that Olson's wrist condition had not reached maximum medical improvement by that date and that Olson needed further treatment.

Olson testified that when he saw Dr. Buehler in 2004, the hand surgeon said that fusion surgery would be a last resort and that Olson's pain was not yet severe enough to justify fusion. Dr. Schoepflin, who made the referral, confirmed that Dr. Buehler opined that Olson's pain was not sufficient to warrant surgery. Dr. Schoepflin also stated the decision to proceed with surgery was Olson's to make because fusion would leave him with a complete loss of wrist mobility. Dr.

Gritzka testified that Olson had reached maximum medical improvement unless he chose to have surgery on his wrists, including fusion, joint replacements, or joint modifications. He agreed that it was up to Olson whether he had surgery, and he thought Olson would have some improved function in his wrists with surgery. Dr. Gritzka described the treatment available to Olson "if he wanted to have [surgery]," but he also stated that Olson had elected not to have surgery. CABR, Dep. of Thomas Gritzka, M.D. at 31, 37-38. Dr. Button testified that Olson would benefit from surgery, thus suggesting that he had not yet refused that option. Olson did not testify either that he had refused surgery or wished to pursue it. The Board summarized the testimony regarding surgery as follows:

> The experts who testified for the parties to this appeal agree that surgery is available. The right wrist could be treated with a fusion, which would reduce pain but would certainly result in greatly reduced mobility, perhaps even a complete loss of mobility of the wrist. A somewhat less drastic surgery, called a proximal row carpectomy, could be done on the left wrist. There is disagreement among the experts about the likely success of that surgery.
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> Although there is some indication in this record that Mr. Olson declined both surgeries, we are not satisfied from this record that Mr. Olson was actually offered surgery in a way that he could weigh the advantages and risks and make a decision on how to proceed. We believe that he should have that opportunity. For that reason, we believe that it is premature to determine that Mr. Olson's conditions have reached maximum medical improvement and we return the claim to the Department for further adjudication.

CABR at 3-4.

With its finding supporting further treatment, the jury concluded that Georgia-Pacific did not show, by a preponderance of the evidence, that the Board's assessment of the testimony was erroneous. Substantial evidence supports the jury's finding that Olson's wrist condition was not fixed as of April 12, 2006.[2]

II. ATTORNEY FEES

A worker is entitled to attorney fees where a court sustains his right to relief in an employer's appeal. *Young*, 81 Wn. App. at 132; RCW 51.52.130. Thus, Olson is entitled to the fees awarded below and to an award of fees for defending this appeal.

Affirmed.

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

Armstrong, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.

[2] Given this conclusion, we do not address the permanent disability issue. *See Pybus Steel Co.*, 12 Wn. App. at 438 (injured worker's condition must be fixed before rating of permanent partial disability can be given).