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WA State Court of Appeals, Division III

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

SANDRA ARTIACH, Respondent, v. GMRI, INC./DARDEN RESTAURANTS, Appellant.	No. 30010-2-III UNPUBLISHED OPINION

Sweeney, J. — This state's workers' compensation scheme requires that an employee be "incapable of performing light or sedentary work of a general nature" for that employee to receive a permanent total disability pension. *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 919, 640 P.2d 1 (1982) (emphasis omitted). The court's findings here support only the proposition that the worker could not "perform employment on a continuous and gainful basis as a restaurant hostess, clerk, or apparel stocker either in Yakima, WA, or in and around Nyssa, OR." Clerk's Papers (CP) 31-32. That is not sufficient to support the conclusion that she is permanently totally disabled. The record

here also shows that she was fired for failing to come to work for a week, not because she was temporarily totally disabled. We therefore reverse the superior court and affirm the conclusions of the Board of Industrial Insurance Appeals (Board) that denied awards for temporary or permanent total disability.

FACTS

Injury and Employment History

Sandra Artiach was a prep cook at the Red Lobster restaurant in Yakima. She had worked there since the restaurant opened in 1991. She was working on June 26, 2002, when a pot of water broke and she slipped on the wet floor. She broke her fall with her left hand. She continued to work, but later she became too sore to work and went to a hospital for treatment.

A doctor specializing in occupational health, Robert Bruce Kite MD, began treating Ms. Artiach on July 2, 2002. Within a month, all of her soreness except that in her left wrist had subsided. Ms. Artiach continued to work as a prep cook and she continued to see Dr. Kite. Her wrist was continually sore and swollen. She had trouble gripping with her left hand. She worked through her pain for some time, but the pain became too intense and she took time off work to receive more treatment. Ms. Artiach continued therapy, but her grip strength and pain got worse.

Ms. Artiach returned to Red Lobster and took a light duty hostess position after taking several months off work. The job required that she greet customers, seat them, hand out menus, and occasionally move around tables. It was less difficult than being a prep cook, but trouble gripping with her left hand caused Ms. Artiach to drop the menus. Her left wrist would also swell and hurt more as her work day progressed. She called in sick often because her wrist hurt.

Ms. Artiach eventually began to work in a modified hostess position. That job required that she greet customers and occasionally answer the phones. But this job also caused her wrist to swell and become painful, so Dr. Kite limited Ms. Artiach to working two hours per day. In the fall of 2004, she missed 20 out of 45 days of work.

Red Lobster's general manager, John Wesley Ostler, met with Ms. Artiach sometime in November 2004. He gave her a "written warning" and told her she needed to improve her attendance to keep her job. During the week of November 22, 2004, Ms. Artiach failed to show up for her shifts and gave no notice that she would be absent. Mr. Ostler prepared a "final written warning" to give Ms. Artiach. He never gave it to her, however, because she never came back to work. He called her home repeatedly, but nobody answered. On December 1, 2004, he mailed a letter to her home asking her to contact him. She never did. Red Lobster never heard from her again and eventually

removed her from its computer system. Mr. Ostler said that Ms. Artiach would still have a job had she corrected her absenteeism.

Procedural History

GMRI, Inc./Darden Restaurants (Darden) owns Red Lobster and self-insures for industrial injuries. It paid Ms. Artiach time-loss benefits through November 29, 2004. On October 23, 2006, the Department of Labor and Industries determined that Ms. Artiach had a partial permanent disability of "8.00% of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder." Administrative Record (AR) at 22. It ordered Red Lobster to pay Ms. Artiach $6,968.04 for this disability, determined that her medical condition was stable, and closed her claim. Ms. Artiach appealed.

A hearing was conducted before Industrial Appeals Judge William Strange. Ms. Artiach testified that she was 57 years old at the time of the hearing. She attended community college in the early 1970s. She received certificates in hotel management and office machines. Prior to working at Red Lobster, she was an assembly line worker for Goodwill Industries; an apparel stock clerk at Kmart; a census taker; a salesperson at Sears, Roebuck and Co.; and an insurance clerk.

Ms. Artiach testified that she could use her left hand, but putting pressure on the

hand caused intense pain and that she had to rest her wrist frequently. She also explained that she could only use her left hand "so much" until the pain was too much to bear. AR, Hearing Transcript (Sept. 20, 2007) at 21. She could continue using her left hand after resting it.

Ms. Artiach also testified about changes in her personal life since the accident. She was once a tidy housekeeper but household chores became difficult with the use of only one hand. She was an avid gardener, but gave it up because it was too difficult to use her left hand. She also gave up fishing because she can no longer crank the reel.

Ms. Artiach's treating physician, Dr. Kite, concurred with a hand specialist's diagnosis of triangular fibrocartilage complex tear. He indicated that Ms. Artiach showed low grip strength throughout his dealings with her. He noted that Ms. Artiach was "self-restricting" her movements. AR, Kite Dep. at 10. He also noted that the grip strength test "is totally dependent on the contributions of the patient." AR, Kite Dep. at 17. Only on one day, August 4, 2003, did he observe progress—"improvements in overall functional capacity and ability to lift and bear weight." AR, Kite Dep. at 19.

He said that Ms. Artiach's subjective complaints about her wrist outweighed his objective findings. He concluded that Ms. Artiach was malingering after he watched an October 20, 2004 surveillance video. The video showed her pushing a grocery cart and

putting groceries in her car using her left hand. He planned to confront Ms. Artiach about this at her next appointment. However, she came in earlier than scheduled. And she was tearful and appeared to be sincerely in pain, so he treated her pain rather than confronting her. In October 2005, he concluded that Ms. Artiach could work as a full-time hostess so long as she limited lifting to less than 5 pounds on an occasional basis.

In August 2007, Dr. Kite watched another surveillance video of Ms. Artiach. It captured 90 minutes of activity on June 8 and 9, 2007. The video showed Ms. Artiach unlocking a padlock, opening a sun umbrella, pushing a rototiller, raking a small area, and moving a sprinkler. Based on that video, Dr. Kite also approved work as an apparel stock clerk or as a cashier. Both of these jobs required lifting 10 pounds repetitively and lifting 20 pounds occasionally. However, he stated that he would have stuck to his October 2005 conclusion had he known that the umbrella weighed less than 5 pounds and that the rototiller was less than 10 pounds and was being dragged across cement. Ms. Artiach testified as to those facts.

Two orthopedic surgeons suggested that Ms. Artiach was malingering and that she was capable of working as a hostess, apparel clerk and cashier, or an apparel stock clerk. Michael D. Barnard MD examined Ms. Artiach on December 17, 2003. He diagnosed her with a sprained left wrist or "possibly" an "internal derangement of the wrist." AR,

Barnard Dep. at 23. He noted that she had zero grip strength in her left hand and that she complained of numbness in areas where numbness should not be found. He found no evidence of pain disorder or of sympathetic dystrophy. He concluded that she was capable of working as a hostess, apparel stock clerk, or cashier.

Orthopedic hand surgeon Sarah Beshlian MD examined Ms. Artiach on August 23, 2005. She concluded that there was no nerve damage because Ms. Artiach's left hand or arm muscles had not atrophied. Like Dr. Barnard, Dr. Beshlian found that Ms. Artiach had no grip strength and that some of her complaints were inconsistent. Dr. Beshlian noted that Ms. Artiach could rub her own left wrist, but she gasped with pain when Dr. Beshlian lightly touched it. She also noted that Ms. Artiach's wrist had a much more limited range of motion upon examination than what Dr. Beshlian observed casually. But Dr. Beshlian concluded that Ms. Artiach's limited range of wrist motion left her partially permanently disabled. Dr. Beshlian also concluded Ms. Artiach was capable of working as a hostess, apparel stock clerk, or cashier.

Shuji Yamamoto is a vocational rehabilitation counselor. He performed a market survey and prepared an employability assessment report. He relied on Dr. Beshlian's report restricting Ms. Artiach to lifting or carrying no more than 15 pounds. He testified that Ms. Artiach was employable as a hostess, cashier, or apparel clerk based

upon Ms. Artiach's transferable skills.

Industrial Appeals Judge William R. Strange affirmed. The Proposed Decision and Order (PDO) included the following findings:

> 4. Ms. Artiach does not have a pain disorder caused by her industrial injury; she exaggerates her pain complaints during medical examinations; her true pain level is much lower than that which she demonstrates to doctors.
>
> . . . .
>
> 6. Ms. Artiach has sufficient use of her left hand to perform employment on a continuous and gainful basis as a restaurant hostess, clerk, or apparel stocker either in Yakima, Washington, or in and around Nyssa, Oregon.
> 7. Ms. Artiach exaggerates the pain and limitations in range of motion and grip strength in her left hand during medical examinations; her true abilities exceed those she demonstrates to doctors.
> 8. As of October 23, 2006, Ms. Artiach would not have benefited from any further medical care for her left hand injury.
> 9. Between November 30, 2004, and October 23, 2006, Ms. Artiach was not precluded by the residuals of the industrial injury from engaging in reasonably continuous, gainful employment.
> 10. As of October 23, 2006, Ms. Artiach had permanent impairment that was equal to 8 percent of the amputation value of left arm at or above the deltoid insertion or by disarticulation at the shoulder.
> 11. As of October 23, 2006, Ms. Artiach was not precluded by the residuals of the industrial injury from engaging in reasonably continuous, gainful employment for the foreseeable future.

AR at 19-20.

The Board denied Ms. Artiach's petition for review and Ms. Artiach appealed to Yakima County Superior Court. A Yakima County Superior Court Judge reversed and found that Ms. Artiach was partially and

totally permanently disabled. The court also concluded that Ms. Artiach was totally and temporarily disabled between November 30, 2004 and October 23, 2006. The superior court entered findings as part of his Decision on Industrial Insurance Appeal. But it addressed "[*o*]*nly those Findings of Fact and Conclusions of Law listed in the Statement of Errors section of the Petition for Review. . . . All others in the PDO will be considered verities.*" CP at 31 (emphasis added). The superior court found:

> 4. Plaintiff does not have a pain disorder caused by the industrial injury. However, she does experience real pain when she uses her left arm or wrist. The greater or more extended the use, the greater the pain.
>
> . . . .
>
> 6. Plaintiff does not have sufficient use of her left hand to perform employment on a continuous and gainful basis as a restaurant hostess, clerk, or apparel stocker either in Yakima, WA, or in and around Nyssa, OR. Although she can perform some or all of the functions of a restaurant hostess, she is not able to do so on a full or near full time basis. Furthermore, there has not been available for Plaintiff, and there will not reasonably be available in the foreseeable future, full or near full time employment as a restaurant hostess.
>
> 7. Plaintiff's pain levels and limitations on range of motion and grip strength vary from day to day. There may be some days during which her abilities exceed those demonstrated to doctors, but overall she is not exaggerating her condition.
>
> 9. Between November 30, 2004, and October 23, 2006, Plaintiff was precluded by the residuals of the industrial injury from engaging in reasonably continuous, gainful employment.
>
> 10. As of October 23, 2006, Plaintiff had permanent impairment that was equal to 8 percent of the amputation value of her left arm at or above the deltoid insertion or by disarticulation at the shoulder. However, Plaintiff had not suffered permanent partial impairment of her mental

health as a result of her industrial injury.

11. As of October 23, 2006, Plaintiff was precluded by the residuals of the industrial injury from engaging in reasonably continuous, gainful employment for the foreseeable future.

CP at 31-32. Darden appeals.

DISCUSSION

Darden makes four essential arguments here on appeal: (1) the superior court's findings 4, 6, and 7 were not supported by substantial evidence; (2) the conclusion that Ms. Artiach is permanently and totally disabled is not supported by the findings; (3) Ms. Artiach is not entitled to total temporary disability benefits because she was terminated for cause; and (4) that Ms. Artiach is not entitled to both permanent total and permanent partial disability benefits. Because we ultimately conclude that the findings do not support total permanent disability, we need not address Darden's fourth argument. We address its other arguments in turn.

I. Substantial Evidence Supports the Superior Court's Findings

The findings and the decision of the Board are prima facie correct, but the trial court reviews its decision de novo. RCW 51.52.115. The superior court may substitute its own findings for the Board's findings if it finds "'from a fair preponderance of credible evidence', that the Board's findings and decision are incorrect." *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992) (quoting *Weatherspoon v. Dep't of Labor & Indus.*, 55 Wn. App.

439, 440, 777 P.2d 1084 (1989)). If the superior court did not grant summary judgment affirming the Board, then, "review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996). We are required to look at the record in a light most favorable to the prevailing party. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). And we will not reweigh the evidence; we leave whether the burden of persuasion has been met to the trier of fact. *Id.*

Review is also limited to those findings that are challenged with argument and citations to the record. RAP 10.3(a)(5)-(6); *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002). Darden assigns error to findings 4, 6, and 7. Br. of Appellant at 3-4, 30. It fails, however, to cite to the record or otherwise argue why finding 6 is wrong. *See* Br. of Appellant at 29-32. Accordingly, we accept that finding as a verity. *See* RAP 10.3(a)(5)-(6); *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733 n.6, 57 P.3d 611 (2002); *Milligan*, 110 Wn. App. at 635.

Essentially, Darden argues that findings 4 and 7 are not supported by substantial evidence because the superior court should have believed Drs. Beshlian and Barnard, and the more damaging parts of Dr. Kite's testimony over Ms. Artiach and the more favorable

parts of Dr. Kite's testimony. But we must view the evidence in this record in the light most favorable to the prevailing party. *Gagnon*, 110 Wn. App. at 485. It is for the trial court, not us, to weigh conflicting testimony. *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964).

A. *Finding 4 – Ms. Artiach "does experience real pain when she uses her left arm or wrist. The greater or more extended the use, the greater the pain."*

Darden argues that the finding is incorrect because it is contradicted by expert testimony that Ms. Artiach was malingering. Br. of Appellant at 30-32. Drs. Beshlian, Barnard, and Kite testified that she may have been malingering, that she exaggerated her pain, and that the symptoms she reported were not consistent with objective findings.

But pain is purely subjective according to her treating physician. The superior court could have relied on Ms. Artiach's testimony regarding her pain rather than that of Drs. Beshlian, Barnard, and Kite. Ms. Artiach was then in the best position to know whether or not she had pain. Ms. Artiach testified that putting pressure on her left hand caused pain and that she could use her left hand until the pain became unbearable. Dr. Kite also observed that Ms. Artiach appeared to be in pain on November 5, 2004. This evidence, modest as it is, supports the superior court's findings.

B. *Finding 7 – "Plaintiff's pain levels and limitations on range of motion and grip strength vary from day to day. There may be some days during which her abilities exceed those demonstrated to doctors, but overall she is not exaggerating her condition."*

Again, Darden argues that there is not substantial evidence to support the court's finding because it is contradicted by expert testimony. Darden points out that "[c]ontrary to the trial court's finding that Ms. Artiach's limitations or abilities vary from day to day, Dr. Barnard explained that not only were her demonstrated activities medically inconsistent, but they would be medically 'impossible' according to what she reported her limitations to be." *Id.* at 31. Darden also disputes that Ms. Artiach does not exaggerate her condition because Drs. Beshlian, Barnard, and Kite all said that she did exaggerate. *Id.* at 30-31.

The June 8 and 9, 2007 surveillance videos show Ms. Artiach exceeding the limitations demonstrated to her doctors. She had no grip strength when examined by the doctors. Yet in the video she grips several items using her left hand in the 2007 surveillance video. Ms. Artiach reconciled these by explaining that she could work with her left hand to some extent, but would then have to rest it. Despite Dr. Barnard's opinion that it would be "impossible" for Ms. Artiach to use her hand at all with her reported limitations, the trial court was entitled to believe Ms. Artiach's testimony as to her limitations.

There was also evidence to support the court's finding that Ms. Artiach was not exaggerating overall. Ms. Artiach's injury did not just affect her professional life. Ms. Artiach testified that she could no longer

participate in hobbies like gardening and fishing. That Ms. Artiach quit doing activities she found enjoyable suggests that she had legitimate pain and was not exaggerating overall. In sum, there is substantial evidence to support finding 7.

II. Total Permanent Disability

Darden argues that the court's findings do not support the court's conclusion that Ms. Artiach is permanently totally disabled even if those findings were supported by substantial evidence. Br. of Appellant at 23-25. That is a question of law that we will review de novo. *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006) (citing *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999)).

A worker has a "permanent total disability" if the injury "permanently incapacitate[es] the worker from performing any work at any gainful occupation." RCW 51.08.160. To prove permanent total disability, a worker must show (1) that he or she could work prior to an injury and is unable to work after the injury because of the injury; (2) by expert testimony, that the loss of function and limitations on his or her ability to work; and (3) that he or she is not employable in a competitive labor market. *Spring*, 96 Wn.2d at 918; *Young*, 81 Wn. App. at 132 (citing *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 813, 872 P.2d 507 (1994)). The expert medical testimony need only support

the loss of function or limitation or the ability to work; there is no need for expert medical testimony that the worker is permanently totally disabled. *See Adams v. Dep't of Labor & Indus.*, 128 Wn.2d 224, 231-33, 905 P.2d 1220 (1995).

When deciding whether a worker is permanently and totally disabled, the court should make a "'practical and reasonable interpretation'" of the worker's ability to get work. *Leeper*, 123 Wn.2d at 812 (quoting *Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 198, 120 P.2d 1003 (1942)). A worker's strengths, weaknesses, age, education, training, experience, and availability of work in the market all play into whether she is totally and permanently disabled. *Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286, 295, 499 P.2d 255 (1972). Permanent total disability "does not mean that the worker must be absolutely helpless or physically broken and wrecked for all purposes except merely to live." *Spring*, 96 Wn.2d at 919 (citing *Kuhnle*, 12 Wn.2d at 197). If a worker can still perform "light or sedentary work of a general nature," then the worker is not permanently and totally disabled. *Id.* (emphasis omitted). This also assumes that the employee can still perform services that are of a quality, dependability, and quantity and that there is a reasonably stable market for those services. *Id.* (quoting *Lee v. Minneapolis St. Paul Ry.*, 230 Minn. 315, 320, 41 N.W.2d 433 (1950)).

The question here is whether the conclusion of permanent total disability flows

naturally from the findings. *See Young*, 81 Wn. App. at 128. These are the pertinent findings:

> 4. Ms. Artiach "does experience real pain when she uses her left arm or wrist. The greater or more extended the use, the greater the pain."
>
> 6. "Plaintiff does not have sufficient use of her left hand to perform employment on a continuous and gainful basis as a restaurant hostess, clerk, or apparel stocker either in Yakima, WA, or in and around Nyssa, OR. Although she can perform some or all of the functions of a restaurant hostess, she is not able to do so on a full or near full time basis. Furthermore, there has not been available for Plaintiff, and there will not reasonably be available in the foreseeable future, full or near full time employment as a restaurant hostess."
>
> 7. "Plaintiff's pain levels and limitations on range of motion and grip strength vary from day to day. There may be some days during which her abilities exceed those demonstrated to doctors, but overall she is not exaggerating her condition."

We are led to conclude that the conclusion of permanently totally disabled does not flow from these findings. The court's findings support an inference that Ms. Artiach could not do the work that medical experts and a vocational expert said she could do—restaurant hostess, clerk, or apparel stocker. But we cannot infer from these findings that she is unable to perform light or sedentary work of a general nature. The court could have made findings on how Ms. Artiach's weaknesses, age, education, training, and experience made it impossible for her to perform light or sedentary work of a general nature.

Fochtman, 7 Wn. App. at 295. Or, the court could have made findings on how she could no longer perform services that are of a quality, dependability, and quantity that there is a market for. *See Spring*, 96 Wn.2d at 919. Such findings could then support an inference that Ms. Artiach is totally permanently disabled. But the mere facts that she (1) experiences real pain that increases with increased use, (2) cannot work as a hostess, clerk, or apparel stocker, and (3) that her abilities vary from day to day, without more, do not support such an inference.

III. Temporary Total Disability

Darden also contends that the court incorrectly concluded that Ms. Artiach was entitled to temporary total disability compensation. Br. of Appellant at 25-29. The court concluded that Ms. Artiach was entitled to total temporary disability compensation between November 30, 2004 and October 23, 2006 because she was "precluded by the residuals of the industrial injury from engaging in reasonably continuous, gainful employment." CP at 32.

Former RCW 51.32.090(4)(a) (1993), now RCW 51.32.090(4)(b), addressed temporary total disability compensation. It provides that an employer may ask that an injured employee come back to work in a modified position if the employee's doctor approves the work. Former RCW 51.32.090(4)(a). The employee is not entitled to

temporary total disability payments while working at the modified position. *Id.* The statute states:

> Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician as able to perform available work other than his or her usual work, the employer shall furnish to the physician, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician to relate the physical activities of the job to the worker's disability. The physician shall then determine whether the worker is physically able to perform the work described. *The worker's temporary total disability payments shall continue until the worker is released by his or her physician for the work, and begins the work with the employer of injury.*

Id. (emphasis added). It also provides that an injured worker doing light duty work with his or her employer is entitled to temporary total disability payments if the light duty work "comes to an end" before the worker can return to his previous work. It states:

> *If the* [*light duty*] *work comes to an end* before the worker's recovery is sufficient in the judgment of his or her physician to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, *the worker's temporary total disability payments shall be resumed.*

Id. (emphasis added).

Construction of a statute is a question of law that is reviewed de novo. *Jacobsen v. Dep't of Labor & Indus.*, 127 Wn. App. 384, 389, 110 P.3d 253 (2005). In interpreting the Industrial Insurance Act, Title 51 RCW, we give effect to the legislature's intent and

accept that the statute "is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). Review of a statute begins with its plain language. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). And the legislative intent behind an unambiguous statute is determined from the statute's plain language alone. *Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994).

The parties focus on whether Ms. Artiach's work came to an end as contemplated by former RCW 51.32.090(4)(a). According to *O'Keefe v. Dep't of Labor & Indus.*, this statute does not require temporary total disability payments when the injured worker is fired. 126 Wn. App. 760, 766, 109 P.3d 484 (2005). In *O'Keefe*, Mr. O'Keefe returned to a light duty job and performed it poorly. *Id.* at 762-63. He was fired when his employer told him to report back to work after an appointment and he refused. *Id.* at 763.

The *O'Keefe* court concluded that RCW 51.32.090(4)(a) did not contemplate paying workers temporary total disability benefits after the worker was terminated for cause. The court explained: "The work did not come to an end within the meaning of RCW 51.32.090(4)(a). O'Keefe stopped performing [the work] because [his employer]

fired him for misconduct." *Id.* at 766. *O'Keefe* concluded that reading the statute to provide temporary total disability to a fired worker would cause an absurd result. *Id.* at 768. The court explained: "He could have reinstated his [temporary total disability] benefits at any time by performing poorly and thereby forcing Woodinville to fire him. The legislature surely expects more from O'Keefe and the other temporarily disabled workers." *Id.*

The decision was also bolstered by two Board decisions that reached similar conclusions. *Id.* at 766-67 (citing *In re Thomas*, No. 00 10091 (Wash. Bd. Of Indus. Ins. Appeals July 31, 2001); *In re Soesbe*, No. 02 19030 (Wash. Bd. of Indus. Ins. Appeals Sept. 25, 2003). In *Soesbe*, the Board relied on RCW 51.32.090(4)(a) to conclude that Ms. Soesbe was not entitled to temporary total disability benefits when she was terminated for misconduct. This was because a worker is entitled to temporary total disability "until the worker is released by his or her physician for the work, and begins the work with the employer of injury." Former RCW 51.32.090(4)(a). Ms. Soesbe's physician released her and Ms. Soesbe began work with her employer of injury. Thus, there was work available to her, but she was not performing it due to her misconduct.

In *Thomas* and *Soesbe*, the Board also reasoned that an employer should not have to tolerate poor performance in an injured worker that it would not tolerate in its other

workers. In *Thomas*, a janitor who was fired for aggressive behavior toward other employees was not entitled to have temporary total disability benefits resume after he was fired for disciplinary reasons unrelated to his industrial injury. Mr. Thomas argued that he was fired because his injury made him unable to perform all of his old janitorial duties. The Board rejected this because it could "easily infer that this discipline would have been administered to any other employee who engaged in this type of behavior." *In re Thomas*, No. 00 10091, at 3. *Soesbe*'s reasoning was parallel and it further explained that an employer should not have to sacrifice having "a satisfactory work force at the cost of replacing wages for an employee who would be earning the wage, but for his or her own behavior." *In re Soesbe*, No. 02 19030, at 2.

The parties dispute whether the end of Ms. Artiach's employment should be characterized as termination for cause or a termination related to her industrial injury. Darden argues that Ms. Artiach was fired for being a bad employee. Br. of Appellant at 28-29. It relies on Ms. Artiach calling in sick frequently and notes that she was fired when she missed an entire week of work and would not even answer her phone. *Id.* at 28. Ms. Artiach argues that she "was not fired because of misconduct that was unrelated to her industrial injury, but instead because of restrictions on her ability to work that were directly related to her industrial injury." Br. of Resp't at 19. She points out that she

missed work because she was in too much pain to work and that she fell asleep at work because her prescribed pain medicine made her drowsy. *Id.* at 19-20. She also says that her hours were cut to such an extent that it made it impractical to come to work. *Id.* at 20.

However, there was work available to Ms. Artiach because Dr. Kite determined that she was physically able to perform the work described. *See* former RCW 51.32.090(4)(a). And Ms. Artiach's employment ultimately ended for reasons unrelated to her injury. She failed to show up for a week's shifts just prior to her employment ending. Her manager tried to contact her by phone and mail about her absence. Ms. Artiach never contacted him and never showed up to work again. Her wrist injury surely did not prevent her from calling her manager or giving notice as to why she would miss a week's work.

Like in *O'Keefe*, Ms. Artiach's employment ended in a way not contemplated by RCW 51.32.090(4)(a). Ms. Artiach's work did not come to an end. She chose not to do the work. We conclude that Ms. Artiach is not entitled to total temporary disability for from November 30, 2004 to October 23, 2006 by the language of former RCW 51.32.090(4)(a).

We reverse the decision of the superior court and affirm the decision of the Board.

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

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Sweeney, J.

WE CONCUR:

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Siddoway, A.C.J.

_____
Kulik, J.