

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 IN RE: RONALD D. LEISCHNER) DOCKET NO. 12 19124
2)
3 CLAIM NO. AF-09882) PROPOSED DECISION AND ORDER

4 INDUSTRIAL APPEALS JUDGE: Heidi G. Bolong

5 APPEARANCES:

6 Claimant, Ronald D. Leischner, by
7 Williams Wyckoff & Ostrander, PLLC, per
8 Douglas P. Wyckoff

9 Employer, Jones & Roberts Company,
10 None

11 Retrospective Rating Group, Associated General Contractors, by
12 Brandy Jones, Lay Representative

13 Department of Labor and Industries, by
14 The Office of the Attorney General, per
15 Katy J. Dixon, Assistant

16 The claimant, Ronald D. Leischner, filed an appeal with the Board of Industrial Insurance
17 Appeals on August 6, 2012, from an order of the Department of Labor and Industries dated
18 August 2, 2012. In this order, the Department affirmed its orders of July 5, 2012, and July 12, 2012.
19 The July 5, 2012 order ended time-loss compensation benefits as paid though January 27, 2012,
20 because the worker was released to work, and was assessed an overpayment of \$3,025.71. The
21 July 12, 2012 order closed the claim effective July 12, 2012, with time-loss compensation benefits
22 as paid through January 27, 2012, because the medical record showed treatment was no longer
23 necessary and there was no permanent partial disability. The Department order is **REVERSED**
24 **AND REMANDED.**

PROCEDURAL AND EVIDENTIARY MATTERS

25 On October 4, 2012, the parties agreed to include the Jurisdictional History in the Board's
26 record. That history establishes the Board's jurisdiction in this appeal. On March 13, 2013, the
27 parties stipulated that the claimant had reached maximum medical improvement as of January 27,
28 2012, and needed no further medical treatment as of that date. On April 18, 2013, the parties
29 stipulated that time-loss compensation benefits was properly paid from January 11, 2012, through
30 January 24, 2012, by a Department order dated July 2, 2012; that the Department order dated
31 July 5, 2012, was incorrect as to the remaining overpayment balance, which is \$1,611.09, not
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1 \$3,025.71; that the claimant is not seeking vocational benefits; that the claimant's conditions were
2 fixed vocationally and medically as of July 11, 2012, and continuing through July 27, 2012; and that
3 the claimant is requesting time-loss compensation benefits from January 25, 2012, through July 10,
4 2012, and the status of a permanently and totally disabled worker as of July 11, 2012.

5 The following depositions are published in accordance with WAC 263-12-117:

6 The November 19, 2012, deposition of Scott Slattery, M.D.: This deposition is published with
7 all objections overruled and all motions denied except that the objection at page 11 is sustained.

8 The November 19, 2012, deposition of Daniel Hughes, DPT: This deposition is published
9 with all objections overruled and all motions denied except that the objections at pages 8, 19, 20,
10 23, and 24 are sustained.

11 The January 8, 2013, deposition of Barbara Berndt, M.Ed., CRC, CCM: This deposition is
12 published with all objections overruled and all motions denied except that the objections at
13 pages 18, 29, 30, 35, and 36 are sustained.

14 The January 23, 2013, deposition of Bryant G. Marchant, M.D.: This deposition is published
15 with all objections overruled and all motions denied except the objections at pages 35, 54, and 55
16 are sustained.

17 The February 22, 2013, deposition of Karin L. Larson: This deposition is published with all
18 objections overruled and all motions denied except that the objections at page 6 are sustained.

19 ISSUES

20 The issues presented by this appeal are whether the claimant was entitled to time-loss
21 compensation benefits from January 25, 2012, through July 10, 2012, and whether the claimant is
22 entitled to an award of permanent total disability as of July 11, 2012.

23 EVIDENCE PRESENTED

24 Mr. Leischner's Testimony.

25 Ronald D. Leischner is a 57-year-old man with a high school education and vocational
26 school apprenticeship in carpentry who has worked as a carpenter since he graduated from high
27 school. While working for the employer, Jones & Roberts Company (Jones & Roberts),
28 Mr. Leischner did concrete work and fixed doors which involved frequent heavy lifting. The heavy
29 lifting included picking up sheets of plywood and 50-pound boxes of nails, and carrying boxes of
30 nails up ladders. Mr. Leischner's work required that he lift an average of 75 pounds continually,
31 and weights of 25 to 100 pounds occasionally.

1 Mr. Leischner filed a claim on February 17, 2011, asserting aching in his hands. He was
2 having difficulty sleeping because his arms would fall asleep. He had been experiencing increased
3 numbness in his hands and arms for numerous years, and was getting frustrated because he could
4 no longer use the tools the way he always had. Following carpal tunnel surgery on both hands, the
5 numbness in his arms was much better, but his hands were worse than before. After his surgery he
6 had difficulty climbing ladders, lifting, and with his fine motor skills. Physical therapy helped a bit,
7 but he still had the same difficulty.

8 Dr. Slattery released Mr. Leischner to work in January 2012. Mr. Leischner has remained a
9 member of the union and is in the union referral service, but has not received a call because there
10 is no light-duty work available. He continues to receive unemployment benefits based upon his
11 representation that he is ready, willing, and able to go to work. He is also receiving union pension
12 funds, which he would have applied for regardless of the issues with his hands.

13 Ms. Sandstrom's Testimony.

14 Liz Linda Sandstrom, the claimant's girlfriend, testified that Mr. Leischner tries to perform
15 maintenance activities around the house and the yard, including removal of shrubberies, installing
16 shelving in the garage, performing housework, and limbing trees, but has difficulty. The work on
17 the trees required Mr. Leischner to use a ladder. He is a lot slower now than he was when she
18 knew him 30 years ago; he gets frustrated and tires more easily now.

19 Ms. Larson's Testimony

20 At hearing, Karin Larson, a certified vocational rehabilitation counselor, testified that she
21 interviewed Mr. Leischner and reviewed his medical records. She also contacted Mr. Leischner's
22 union to confirm that the job analysis she had for Mr. Leischner was accurate for his job of injury.
23 Ms. Larson was of the opinion, on a more-probable-than-not basis, that Mr. Leischner was not able
24 to return to work as a carpenter or obtain employment as a carpenter between the dates of
25 January 28, 2012, and August 2, 2012. Her opinion was based on his physical capacities, including
26 limitations in lifting, fine manipulation, dexterity, and the ability to use vibratory or pneumatic tools.
27 Based on her research into the labor market for carpenters, Ms. Larson is of the opinion that there
28 are no carpenter, maintenance, or locksmith jobs, suitable for Mr. Leischner's physical capacities.
29 Ms. Larson would have recommended retraining for Mr. Leischner.

1 Dr. Hughes' Testimony

2 Daniel Hughes, DPT, performed a physical capacity evaluation of Mr. Leischner on May 29,
3 2012. Mr. Leischner was complaining of bilateral hand and wrist pain and tingling. He felt he had a
4 great deal of loss of fine motor skills, such as working with small nuts and bolts or small nails. His
5 pain level was 2 out of 10 at rest, and 5 out of 10 with activity. Dr. Hughes found that Mr. Leischner
6 had a small loss of motion in flexion of his wrists, a little more loss with extension of his wrists, and
7 some deficits in ulnar deviation. Mr. Leischner fell within normal ranges for grip strength, was able
8 to lift 47 pounds from floor to waist, 33 pounds from waist to shoulder, 28 pounds from shoulder to
9 overhead, and was able to carry 35 pounds for 50 feet on an occasional basis. He would be able to
10 perform those actions frequently at 50 percent of the weights listed, and he would be able to
11 constantly perform those actions at 20 percent of those weights. These weights are low for a
12 typical construction worker, who must be able to lift 80 to 85 pounds. Mr. Leischner was restricted
13 to crawling on a seldom basis for a short distance, due to his inability to tolerate pressure on his
14 wrist. Mr. Leischner's ability to operate hand controls was restricted to low in resistance and not
15 highly vibratory in nature. He was further restricted to performing repetitive fine motor activities for
16 no more than 20 minutes at a time. In dexterity, Mr. Leischner was in the 27th percentile for his left
17 upper extremity and the 24th percentile for his right upper extremity.

18 Dr. Hughes concluded that Mr. Leischner would not be able to perform the position of
19 carpenter based upon the lifting and handling requirements that were outlined in the job analysis
20 prepared by a vocational rehabilitation specialist. Dr. Hughes further clarified that Mr. Leischner
21 would be characterized as at the upper end of the light category as defined by the Dictionary of
22 Occupational Titles, while his job position of carpenter is in the heavy category. An analysis of
23 Mr. Leischner's job noted that it required constantly lifting up to 25 pounds, with constantly defined
24 as over 70 percent of the work day, and occasionally lifting or carrying 80 pounds, with occasionally
25 defined as up to 30 percent of the work day. Mr. Leischner could lift a maximum of 47 pounds
26 occasionally and 9.4 pounds on a constant basis.

27 Dr. Slattery's Testimony

28 Scott Slattery, M.D., a certified orthopedic surgeon, first saw Mr. Leischner on July 18, 2011,
29 for numbness and tingling in his hands. Dr. Slattery found that his symptoms were consistent with
30 bilateral carpal tunnel syndrome related to his work as a carpenter. Dr. Slattery performed a left
31 carpal tunnel release on August 2, 2011, and a right carpal tunnel release on November 1, 2011.

1 At his last visit on January 27, 2012, Dr. Slattery noted that Mr. Leischner was overall very happy
2 with the results of surgery. The numbness and tingling were gone. Mr. Leischner had been
3 working well with physical therapy and felt like most of his strength had come back. He still had just
4 a little bit of loss of manual dexterity and fine motor skills.

5 At the January 27, 2012 visit, Dr. Slattery believed that, even though his job is fairly
6 strenuous, Mr. Leischner was ready and wanted to return to work. Dr. Slattery considered
7 Mr. Leischner fixed and stable at that point, and returned him to work without restrictions to see if
8 he was able to work. However, Dr. Slattery stated that Mr. Leischner would need a physical
9 capacities evaluation, and concurred with the later physical capacities evaluation performed by
10 Dr. Hughes; specifically Dr. Hughes' finding that Mr. Leischner could only lift half of the 80 pounds a
11 carpenter would need to lift, and could not do fine manipulation for more than 20 minutes at a time.
12 Dr. Slattery also noted that the use of vibrating hand tools appears to be a cause of carpal tunnel
13 syndrome and could cause problems following surgery. Dr. Slattery testified that, if he had had
14 Dr. Hughes' physical capacities evaluation in January 2012, he would have said the same thing.

15 Dr. Marchant's Testimony

16 Bryant Marchant, M.D., an orthopedic surgeon, performed an independent medical
17 evaluation of Mr. Leischner on March 28, 2012. Mr. Leischner described the pain in his wrists as
18 being between 2 and 4 out of 10. Range of motion testing showed dorsiflexion on both hands was
19 52 degrees, palmar flexion on the right wrist was 60 degrees and on the left 64 degrees, radial
20 deviation was 15 degrees on both wrists, palmar deviation was 30 degrees on both wrists.
21 Dr. Marchant described Mr. Leischner's plantar flexion and palmar flexion as normal. Sensory
22 testing was essentially normal. Grip strength was 100 pounds on the right, and 120 pounds on the
23 left. His strength was 25 pounds on the right and 30 pounds on the left. Mr. Leischner's grip
24 strength on both sides was well above average for his age. Based on his exam of Mr. Leischner,
25 Dr. Marchant felt that Mr. Leischner did not have any significant sequelae from the surgeries for his
26 bilateral carpal syndrome. Dr. Marchant did not think that Mr. Leischner needed any additional
27 treatment beyond the occupational therapy program Mr. Leischner had just finished. Dr. Marchant
28 considered Mr. Leischner fixed and stable without a ratable impairment.

1 Based on his examination of Mr. Leischner, his review of Dr. Hughes' physical capacities
2 evaluation and testimony, a job analysis for the position of carpenter, an evaluation report from
3 Dr. Paul Allen, and the testimony of Dr. Slattery, Dr. Marchant agreed with Dr. Slattery's initial
4 opinion that Mr. Leischner was ready to return to work in January 2012. Mr. Leischner's physical
5 exam was essentially normal; he had good strength and wanted to return to work. Dr. Marchant felt
6 that there was no medical reason that would prevent him from returning to work if he were suitably
7 motivated. However, Dr. Marchant did not have a job analysis for Mr. Leischner's job at that time,
8 and did not test for Mr. Leischner's fine hand manipulation, crawling, or lifting capabilities. Due to
9 Mr. Leischner's well above-normal grip strength in both his hands, Dr. Marchant would not expect
10 Mr. Leischner to be particularly weak in the muscle groups proximal to his hands.

11 Ms. Berndt's Testimony

12 Barbara Berndt, a certified vocational expert and vocational rehabilitation counselor,
13 reviewed Mr. Leischner's file, including his testimony, independent medical examinations by
14 Drs. Allen and Marchant, Dr. Hughes' physical capacities examination, and other medical records
15 and depositions. Ms. Berndt was of the opinion that Dr. Hughes' physical capacities examination
16 was inadequate because it was too short, lacked some validity scores or reliability factors for some
17 of the tests, and lacked additional tests she felt should have been done. The job analysis reviewed
18 by Dr. Hughes did not appear to be tailored specifically to Mr. Leischner's job. Ms. Berndt believes
19 Mr. Leischner has transferable skills for maintenance work, such as a handyman for a condominium
20 or apartment, or any kind of property management or maintenance requiring lighter tasks.
21 Ms. Berndt believes that such light-duty work is generally available; however, she did not perform
22 any labor market surveys for the position of handyman for this case. Based on Dr. Hughes'
23 statement that Mr. Leischner has functional abilities, Ms. Berndt believes that Mr. Leischner is
24 employable.

25 Ms. Larson's Rebuttal Testimony

26 In her deposition in rebuttal to Ms. Berndt's testimony, Ms. Larson testified that the Dictionary
27 of Occupational Titles does not list handyman as a job within the labor market or within the nation.
28 Three jobs listed in the Dictionary of Occupational Titles that were similar to the property
29 management or maintenance jobs suggested by Ms. Berndt were "maintenance worker/municipal,"
30 "maintenance repair/building," and "maintenance repair/industrial." The first and last are listed as
31 heavy duty, while "maintenance repair/building" is listed as medium duty. Mr. Leischner's job of
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1 carpenter is listed as heavy duty. Ms. Larson researched the issue of whether light-duty condo or
2 apartment maintenance jobs are available in Mr. Leischner's labor market and did not identify any
3 such jobs. She contacted four employers in Mr. Leischner's area and found that they all had job
4 duties similar to that of a carpenter, which would fall between the medium and heavy physical
5 capacities categorization of jobs in the Dictionary of Occupational Titles. Such jobs would therefore
6 not be within Mr. Leischner's capacities. Ms. Larson was of the opinion that Mr. Leischner was not
7 employable in light maintenance worker or handyman jobs because such jobs are not light-duty.
8 Further, she was of the opinion that, without retraining, Mr. Leischner was not employable on a
9 competitive gainful employment basis because there were no occupations that he could
10 immediately obtain and perform in his labor market within his physical capacities. Ms. Larson's
11 opinion in this regard would be the same in January 2012, when Mr. Leischner's time-loss
12 compensation benefits terminated, and in August 2012, when his claim was closed.

13 DISCUSSION

14 A worker is permanently and totally disabled if as a proximate result of his industrial condition
15 he is precluded from obtaining and performing employment generally available in the labor market.
16 *Leeper v. Department of Labor & Indus.*, 123 Wn.2d 803 (1994), citing *Washington. Irrigation. & Dev.*
17 *Co. v. Sherman*, 106 Wn.2d 685 (1986). A worker is temporarily, totally disabled if his industrial
18 condition incapacitates him from performing any work at any gainful occupation. *Oien v. Department*
19 *of Labor & Indus.*, 74 Wn. App. 566 (1994), citing *Bonko v. Department of Labor & Indus.*, 2 Wn. App.
20 22 (1970). Total temporary disability differs from permanent disability only in the duration of the
21 disability, not in its character. *Herr v. Department of Labor & Indus.*, 74 Wn. App. 632 (1994). Merely
22 establishing the worker's inability to return to his job at time of injury does not prove total temporary
23 disability. *Herr; Hunter v. Bethel School Dist.*, 71 Wn. App. 501 (1993), *review denied*, 123 Wn.2d
24 1031 (1994).

25 Mr. Leischner bears the burden of proof to establish his right to receive benefits under the
26 Industrial Insurance Act. *Olympia Brewing Co. v. Department of Labor & Indus.*, 34 Wn.2d 498
27 (1949); *Stafford v. Department of Labor & Indus.*, 33 Wn. App. 231 (1982), *review denied*, 99 Wn.2d
28 1020 (1983). In *Spring v. Department of Labor and Industries*, 96 Wn.2d 914, 919 (1982), the
29 Washington State Supreme Court stated: "Under *Kuhnle [v. Department of Labor and Indus.*,
30 12 Wn.2d 191 (1942)] the injured worker need not show that he cannot perform any light or
31 sedentary work, but must prove only that he is incapable of performing light or sedentary work of a
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1 general nature." In that case the Court held that once the claimant had met his burden of proving
2 that he could not obtain or maintain employment of a general light and/or sedentary nature, the
3 burden of proof then switches to the Department to show that specific light and/or sedentary work is
4 available. *In re Betty Helm*, BIIA Dec., 87 1511 (1988).

5 In this case, the claimant has shown that he cannot return to his job as a carpenter.
6 Mr. Leischner is 57 years old, has no work experience or education beyond that of a carpenter, and
7 can lift only half the weight a carpenter must lift, according to the only expert to examine him relative to
8 that capacity. His attending physician concurred with the physical capacities evaluation, and agreed
9 that Mr. Leischner cannot return to the job of carpenter.

10 The next question is whether Mr. Leischner can perform sedentary or light-duty work of a
11 general nature. The physical capacities evaluation performed by Dr. Hughes establishes that
12 Mr. Leischner can perform at the upper end of the light work category. However, Ms. Larson
13 testified that without retraining, Mr. Leischner was not employable on a competitive gainful
14 employment basis because there were no occupations he could immediately obtain and perform in
15 his labor market within his physical capacities. The testimony of the Department's vocational
16 expert, Barbara Berndt, stated that Mr. Leischner had transferable skills for maintenance work;
17 such as a handyman for a condominium or apartment, any kind of property management,
18 maintenance or lighter-duty tasks, is not persuasive because she did not perform any labor market
19 surveys for such positions, and handyman is not a job listed in the Dictionary of Occupational Titles.
20 I credit the testimony of Ms. Larson regarding the unavailability of light-duty condominium or
21 apartment maintenance jobs.

22 As Mr. Leischner has shown that he cannot perform sedentary or light duty work of a general
23 nature, he has met his burden of proof to establish his right to receive benefits, and the burden has
24 switched to the Department to show that specific light-duty work is available. This the Department
25 has not done. The jobs suggested by the Department's vocational expert, Ms. Berndt, have not
26 been shown to exist in the light work category. Nor has the Department shown that there is other
27 sedentary or light duty work available that Mr. Leischner could perform.

28 I conclude that the Department's order of August 2, 2012, which affirmed the Department's
29 orders of July 5, 2012, which ended time-loss compensation benefits as paid through January 27,
30 2012, and assessed an overpayment of \$3,025.71, and of July 12, 2012, which closed the claim
31 effective July 12, 2012, with time-loss compensation benefits paid through January 27, 2012, is
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1 incorrect and should be remanded to the Department with instructions to assess an overpayment in
2 the amount of \$1,611.09, to allow time-loss compensation benefits from January 25, 2012, through
3 July 10, 2012, and to award permanent total disability as of July 11, 2012.

4 FINDINGS OF FACT

- 5 1. On October 4, 2012, an industrial appeals judge certified that the parties
6 agreed to include the Jurisdictional History in the Board record solely for
7 jurisdictional purposes.
- 8 2. Ronald D. Leischner developed carpal tunnel syndrome that arose
9 naturally and proximately out of distinctive conditions of employment.
- 10 3. As of July 11, 2012, Mr. Leischner's conditions, proximately caused by the
11 occupational disease, were fixed and stable.
- 12 4. Mr. Leischner is 57 years old, has a high school education and vocational
13 school apprenticeship in carpentry, and has over 30 years of experience
14 as a carpenter. He has no other relevant work experience.
- 15 5. Mr. Leischner is limited to lifting only half of the 80 pounds a carpenter
16 would need to lift, cannot do fine manipulation for more than 20 minutes
17 at a time, and is limited in the use of vibrating hand tools, as of
18 January 25, 2012.
- 19 6. Mr. Leischner was unable to perform or obtain gainful employment on a
20 reasonably continuous basis as of January 25, 2012, through July 11,
21 2012, due to the residuals of carpal tunnel syndrome and taking into
22 account the claimant's age, education, work history, and preexisting
23 conditions.

24 CONCLUSIONS OF LAW

- 25 1. The Board of Industrial Insurance Appeals has jurisdiction over the
26 parties and subject matter in this appeal.
- 27 2. Mr. Leischner was a temporarily, totally disabled worker within the
28 meaning of RCW 51.32.090 from January 25, 2012, through July 10,
29 2012.
- 30 3. Mr. Leischner was a permanently, totally disabled worker within the
31 meaning of RCW 51.08.160, as of July 11, 2012.
- 32 4. The Department order dated August 2, 2012, is incorrect and is
reversed. This matter is remanded to the Department to find the amount
of the overpayment was \$1,611.09, to pay time-loss compensation
benefits from January 25, 2012, through July 10, 2012, and to find

