

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: NEIL W. DERLINE )

DOCKET NO. 13 14104

2 )  
3 CLAIM NO. Y-711158 )

PROPOSED DECISION AND ORDER

4  
5 INDUSTRIAL APPEALS JUDGE: Tom M. Kalenius

6  
7 APPEARANCES:

8  
9 Claimant, Neil W. Derline, by  
10 Williams, Wyckoff & Ostrander, PLLC, per  
11 Douglas P. Wyckoff

12  
13 Employer, Pete Muller Logging & Construction,  
14 None

15  
16 Department of Labor and Industries, by  
17 The Office of the Attorney General, per  
18 W. Martin Newman, Assistant  
19

20  
21 The claimant, Neil W. Derline, filed a protest with the Department of Labor and Industries on  
22 March 25, 2013. The Department forwarded it to the Board of Industrial Insurance Appeals as an  
23 appeal. The claimant appeals a Department order dated March 6, 2013. In this order, the  
24 Department affirmed a Department order dated February 5, 2013, that closed the claim with  
25 time-loss compensation benefits as paid through June 24, 2011. The Department order is  
26  
27 **REVERSED AND REMANDED.**

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30 **PROCEDURAL AND EVIDENTIARY MATTERS**

31 On September 24, 2013, and November 18, 2013, the parties agreed to include the  
32 Jurisdictional History in the Board's record. That history establishes the Board's jurisdiction in this  
33 appeal.  
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35  
36 **PRELIMINARY MATTERS**

37 The depositions of Daniel L. Hughes, taken on December 4, 2013, Heather Kroll M.D., taken  
38 on December 5, 2013, and Robert B. Worth, M.D., taken on December 19, 2013, were published  
39 on receipt. All objections are overruled. All motions are denied. Dr. Worth's Deposition Exhibit  
40 Nos. 1 and 2 are renumbered and admitted as Exhibit Nos. 5 and 6.  
41

42 The deposition of Edward Dagher, M.D., taken on January 14, 2014, was published on  
43 receipt. All objections are overruled, except for the objection at page 50, that is sustained. All  
44 motions are denied. Deposition Exhibit No. 1, a Department letter dated December 13, 2010, was  
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1 previously admitted as Exhibit No. 1 on December 10, 2013, is renumbered as Exhibit No. 7 and is  
2 rejected as duplicative. Deposition Exhibit No. 2, the Assignment letter to Dr. Dagher dated July 30,  
3 2012, was marked but not offered, is renumbered as Exhibit No. 8, and remains with the deposition.  
4 Deposition Exhibit No. 3, Doctor's Estimate of Physical Capacities was admitted as Exhibit No. 9.  
5 All other rulings and Orders are affirmed.  
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7

### 8 ISSUES

- 9
- 10 1. As of March 6, 2013, were the conditions, proximately caused by the
  - 11 industrial injury of December 29, 2003, fixed medically and vocationally?
  - 12 2. From June 25, 2011, through March 5, 2013, was Mr. Derline a
  - 13 temporarily totally disabled worker?
  - 14 4. As of March 6, 2013, was Mr. Derline a permanently and totally disabled
  - 15 worker?
  - 16

### 17 Clarification of Time Loss and Pension Periods

18  
19 The Department order dated March 6, 2013, affirmed the provisions of a Department order  
20 dated February 5, 2013. The order dated February 5, 2013, superseded the provisions of a  
21 Department order dated September 27, 2012. The Department order dated September 27, 2012,  
22 ended time loss compensation as paid through September 26, 2012. The Department order dated  
23 February 5, 2013 ended time loss compensation as paid through June 24, 2011.  
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26 The claimant is entitled to time-loss compensation from June 25, 2011, through March 5,  
27 2013, and the status of a permanently and totally disabled worker as of March 6, 2013.  
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### 29 EVIDENCE

30  
31 In support of his appeal, Mr. Derline testified and presented the medical testimony of  
32 Dr. Worth, his attending physician, and Dr. Kroll, a psychiatrist, who attended him during the pain  
33 clinic in 2010. Mr. Derline also presented the testimony of Mr. Daniel Hughes, a physical therapist.  
34 Mr. Derline presented Katrina Linker, a vocational rehabilitation counselor, who provided vocational  
35 services at the direction of the Department. Mr. Derline also presented Kimberly S. Fortman, a  
36 forensic vocational rehabilitation counselor. The evidence presented by the claimant was that he  
37 was incapable of performing and obtaining gainful employment on a reasonably continuous basis  
38 between June 25, 2011, and March 6, 2013.  
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42 In reply, the Department presented the testimony of Steven Fretts and Robert R. Wilson,  
43 former police officers and current investigators with the Department of Labor and Industries, who  
44 conducted surveillance of Mr. Derline's volunteer activities at Jessica Dana Racing. Exhibit  
45 Nos. 2-4.  
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1 The Department presented the testimony of Dr. Dagher, a psychiatrist, who determined  
2 Mr. Derline's conditions proximately caused by the industrial injury of December 29, 2003, did not  
3 prevent Mr. Derline from gainful employment on a reasonably continuous basis as a logging truck  
4 driver.  
5

6  
7 From the evidence, the following chronology emerged:

8 **Mr. Derline's Socioeconomic History**  
9

10 Mr. Derline was born on May 20, 1955. He is 5 feet 10 inches tall and weighs about  
11 195 pounds. Mr. Derline completed high school in 1973 and a two year mechanical training course  
12 in 1976. Mr. Derline testified that he was required to read course materials three or four times to  
13 adequately comprehend and retain the material.  
14

15  
16 Mr. Derline made his living as a mechanic for about ten years, first as an employee and then  
17 as a sole proprietor of an automotive muffler, brake and dynotuning business. Mr. Derline testified  
18 that automotive repair required constant bending, stooping and lifting.  
19

20 Mr. Derline employed two full-time employees and Mr. Derline's wife served as the  
21 bookkeeper. Mr. Derline later hired an accountant to perform the bookkeeping, including payroll.  
22 Mr. Derline had no experience operating a computer and did not acquire computer skills.  
23

24 By 1992-1994, Mr. Derline closed his automotive repair business, but continued dynotuning.  
25 Mr. Derline testified that the demands of dynotuning were limited to moving levers with his hands  
26 while seated at a control panel. Mr. Derline dynotuned an engine for Dr. Worth 17 or 18 years ago,  
27 followed by a second engine tuning less than 10 years ago that could have been after Mr. Derline's  
28 injury in 2003. Dr. Worth testified that he paid Mr. Derline for the tuning services on each occasion.  
29 Worth Dep. at 24. Mr. Derline testified that he assisted in the dynotuning on no more than four  
30 occasions between June 25, 2011, and March 6, 2013.  
31

32 Mr. Derline changed careers and began working as a mechanic/driver for construction  
33 companies. Initially, Mr. Derline drove dump trucks hauling gravel for 1 to 2 years and testified he  
34 then drove logging trucks for the next 9 years.  
35

36 Mr. Derline testified that driving logging trucks demanded heavy exertions. First, the driver  
37 must lift as many as four metal rods weighing up to 40 pounds each and install them to hold the  
38 logs in place on the trailer. Second, Mr. Derline was required to throw 14-foot long chain and cable  
39 binders over the logs and then reach down and pull the binder tight to hold the load of logs. There  
40 were 3 to 4 binders per load and 4 to 8 loads in a typical 8-hour day.  
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1 Mr. Derline's Industrial Injury

2 Mr. Derline suffered two industrial injuries while driving logging trucks. In August 2002,  
3 Mr. Derline wrenched his back and suffered a concussion when the logging truck rolled over going  
4 around a corner. Mr. Derline denied prior neck or back problems. Mr. Derline's unrelated conditions  
5 included high blood pressure, thyroid disorder, a hernia repair, an appendectomy, coronary artery  
6 disease, and a left epiconylitis condition diagnosed in April 2013.  
7

8  
9 On December 29, 2003, Mr. Derline injured his left eye, head, neck and low back when the  
10 logging truck he was driving slid into a guard rail, rolled onto its side, knocking Mr. Derline out.  
11 Mr. Derline complained of head, lumbar, and neck pain with periodic symptoms into his legs,  
12 requiring frequent changes in position from sitting to standing to reclining to alleviate the pain.  
13

14 Initial Treatment for the Industrial Injury

15  
16 Mr. Derline was prescribed pain medications but tapered off the medication to avoid side  
17 effects. Mr. Derline was evaluated by a surgeon but no surgery was performed. Mr. Derline  
18 participated in multiple rounds of physical therapy. Mr. Derline did not work after the December 29,  
19 2003 injury and his disability was certified by Dr. Worth since the injury. Dr. Worth first treated  
20 Mr. Derline on March 22, 2004, with conservative measures.  
21

22 Mr. Derline was treated with epidural injections through May 2007 and intensive  
23 rehabilitation between August 2010 and March 2011. Lumbar MRIs were performed in 2004, 2006,  
24 2009, and 2013.  
25

26 The 2004 MRI depicted minor lumbar disk bulges from L3 through S1 (L3-4, L4-5, and  
27 L5-S1). 11/18/13 Tr. at 133, 138, and 146.  
28

29 The 2013 MRI depicted significant degenerative disc disease, including worsening stenosis  
30 of the lumbar facet joints since the 2009 MRI. The degenerative changes included disc bulges and  
31 protrusions. The lumbar stenosis had narrowed the nerve canal. To compensate for pain during  
32 extension, Mr. Derline flexed his back resulting in a hunchback posture when he walked or stood  
33 upright.  
34

35 Vocational Services

36 Ms. Linker was assigned by the Department of Labor and Industries to provide vocational  
37 services to Mr. Derline beginning in 2004. Ms. Linker provided early intervention services to  
38 determine if Mr. Derline could return to work at his job of injury in 2004. Ms. Linker determined that  
39 Mr. Derline was unable to return to work as a log truck driver.  
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1 In 2004, Ms. Linker testified that Mr. Derline was eligible for assessment of transferable skills  
2 but he was medically unstable. In 2005, Ms. Linker testified that vocational testing was not done  
3 during assessment services.  
4

5 Ms. Linker testified that Mr. Derline's first attempt at retraining was in 2005. Dr. Worth  
6 released Mr. Derline to attempt clerical retraining. Mr. Derline unsuccessfully attempted retraining  
7 for half days on two successive days.  
8  
9

10 Ms. Fortman testified that the December 12, 2005, on-the-job training site for general office  
11 clerk was terminated due to low back pain while sitting. Mr. Derline testified that he was unable to  
12 stretch and reach adequately to file documents. Dr. Worth then restricted Mr. Derline from further  
13 attempting clerical training because Mr. Derline's disability was too great for Mr. Derline to be  
14 productive as a clerk.  
15  
16

17 Ms. Fortman testified that a second retraining plan was scheduled for 2007. Mr. Derline was  
18 to engage in retail business management with training at Centralia College. At that time, Mr. Derline  
19 testified that he walked across the parking lot to the classroom and experienced great pain.  
20 Mr. Derline left the college without training as he understood his physical condition was not ready  
21 for retraining as a clerk.  
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25 In 2011, Ms. Linker was reassigned by the Department to assess if Mr. Derline possessed  
26 transferable skills for light-duty work or if he would benefit from training in light-duty positions. After  
27 interviewing Mr. Derline on January 21, 2011, Ms. Linker investigated clerical and security positions  
28 that demanded light level of exertions. Ms. Linker testified Mr. Derline had not performed those  
29 positions previously and lacked the skills demanded of light-duty positions.  
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32 The vocational testimony was persuasive that Mr. Derline had permanent restrictions on his  
33 capacities that disqualified him from working full time in any of his prior occupations. Ms. Linker  
34 defined the relevant labor market as the Grays Harbor cities of Elma and Aberdeen and  
35 surrounding areas within a 50-mile radius of Mr. Derline's home in Elma. Ms. Fortman set the  
36 relevant labor market as those cities within a 60-miles radius, including Olympia and Centralia.  
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40 In 2011, Ms. Linker reported to the Department that there were no transferable skills that  
41 allowed Mr. Derline to work full time in a light or sedentary duty job.  
42

43 Ms. Linker reviewed the neuropsychiatric evaluation performed in 2010 upon Mr. Derline's  
44 discharge from Rehabilitation Institute of Washington. Ms. Linker learned Mr. Derline had  
45 permanent preexisting deficits in reading and writing. Ms. Linker testified that the physical  
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1 limitations and academic deficits precluded Mr. Derline from further retraining and employment in a  
2 clerical position.

3  
4 Ms. Linker recommended to the Department that Mr. Derline could not obtain light or  
5 sedentary employment without further retraining. Ms. Linker reported to the Department that without  
6 further training, Mr. Derline was unable to obtain continuous gainful employment in his relevant  
7 labor market.  
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9  
10 Ms. Fortman explained that the discharge report from Dr. Kroll dated January 21, 2011,  
11 indicated Mr. Derline could work in sedentary and light-duty jobs. Ms. Fortman explained light-duty  
12 demanded lifting to 20 pounds and sedentary duty required up to 5 pounds. Ms. Fortman testified  
13 that Mr. Derline had no transferable skills.  
14

15  
16 Ms. Linker testified that additional information regarding the claimant's hobbies would not  
17 have changed her opinions because they were based on physical limitations on sitting up to 3 to  
18 4 hours per day and a full-time position demanded sitting for 8 hours per day.  
19

20  
21 Ms. Fortman testified that the Department found Mr. Derline capable of obtaining and  
22 performing full-time employment as a logging truck driver based on Dr. Dagher's September 2012  
23 examination. The Department terminated time-loss compensation as of June 24, 2011.  
24 Ms. Fortman testified that the Department's determination from 2004 to 2011 that Mr. Derline was  
25 entitled to retraining meant that the option to return to work at the job of injury had been ruled out.  
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28 Mr. Derline testified he searched for employment as a truck driver in 2012 and could not  
29 obtain employment.  
30

### 31 Medical Treatment

#### 32 Dr. Worth

33  
34 Dr. Worth continued to treat Mr. Derline's back, neck, shoulder, and left eye on June 30,  
35 2011, August 29, 2011, October 31, 2011, December 30, 2011, April 11, 2012, and May 30, 2012.  
36 Dr. Worth testified that Mr. Derline made a full effort in retraining to be a general office clerk. The  
37 Department's investigator, Mr. Fretts, prepared a letter for Dr. Worth to sign that released  
38 Mr. Derline to retrain as a general office clerk. Dr. Worth responded by writing that lumbar  
39 spondylosis was also proximately caused by the industrial injury. Exhibit No. 6.  
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43 Dr. Worth testified Mr. Derline's posture was bent over because he supported his upper body  
44 weight on his hands placed on his hips and his back was canted forward. Dr. Worth testified the  
45 degree of the bend was between 10 or 15 degrees to 90 degrees. Dr. Worth testified that  
46 Mr. Derline flexed his back to increase the space for the nerve.  
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1 Dr. Worth testified that the restrictions on Mr. Derline's activities were permanent as of June  
2 2011 and were proximately caused by the industrial injury of December 29, 2003.  
3

4 Dr. Worth did not release Mr. Derline to perform continuous gainful employment as a log  
5 truck driver, auto mechanic or lubrication technician, general office clerk, or NASCAR crew chief  
6 and did not know of any occupation that was within Mr. Derline's capacities.  
7

8 Dr. Worth testified that:  
9

10 Mr. Derline cannot stand straight up. He has a difficult time ambulating  
11 with any speed, and he appears to have to continue to seek positions of  
12 comfort which are not compatible with full-time work.  
13

14 Worth Dep. at 19.

15 **Dr. Kroll:**

16 Dr. Kroll treated Mr. Derline when he was admitted to the Rehabilitation Institute of  
17 Washington in August 2010. At that time, Mr. Derline disclosed to Dr. Kroll that he volunteered for a  
18 car race team.  
19

20 Mr. Derline enjoyed his hobby of stock car racing in Tenino and Monroe. He drove a stock  
21 car for a brief time and then owned his own car before volunteering with other local race teams. The  
22 racing season was from May to September and he participated in five races per season. Mr. Derline  
23 first volunteered for Tom Sweatman racing in 2010 or 2011 and then for Jessica Dana Racing from  
24 2011 to 2013.  
25

26 Dr. Kroll reviewed the surveillance videos of Mr. Derline's volunteer activities for Jessica  
27 Dana Racing on April 21, 2012, and September 8, 2012. Dr. Kroll described Mr. Derline's constantly  
28 flexed forward posture. Dr. Kroll testified the posture was characteristic of lumbar spinal stenosis.  
29 Dr. Kroll explained that extension of the spine compressed nerve roots and the hunched over  
30 posture minimized nerve root compression by flexing the spine. Dr. Kroll found that Mr. Derline's  
31 significant hip flexion contractures prevented him from straightening out all the way, further  
32 contributing to forward bending.  
33

34 Mr. Derline was supervised by Dr. Kroll in the pain clinic program for 20 days between  
35 November 22, 2010, and December 21, 2010, prior to the issuance of a discharge report dated  
36 January 21, 2011.  
37

38 March 14, 2011, was the end of Mr. Derline's treatment follow up at Rehabilitation Institute of  
39 Washington. Dr. Kroll examined Mr. Derline again on August 12, 2013.  
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1 Dr. Kroll testified lumbar extension was severely restricted. Comparing Mr. Derline's range of  
2 motion between January 21, 2011, and August 2013, Dr. Kroll found that he had lost hip extension  
3 of 20 degrees. Dr. Kroll stated that the restricted flexion was due to stenosis and nerve compromise  
4 and was an objective limitation.  
5

6  
7 Dr. Kroll testified the nerve root space was narrowed further during lumbar extension,  
8 preventing Mr. Derline from standing or walking upright. Dr. Kroll testified that Mr. Derline's lack of  
9 lumbar extension and forward flexed posture was consistent with the objective findings on MRI,  
10 particularly the lumbar stenosis.  
11

12  
13 Dr. Kroll diagnosed cervical and lumbar strains, spondylosis, and significant degenerative  
14 changes in the lumbar and cervical spine related to the industrial injury.  
15

16 Dr. Kroll rated the extent of Mr. Derline's permanent partial impairments. Cervical  
17 impairments equaled Category 3 and lumbosacral impairments were Category 2.  
18

19 Dr. Kroll's examination, conducted on August 12, 2013, was close enough in time to  
20 March 6, 2013, to be relevant. Dr. Kroll noted continued low back pain radiating into the lower  
21 extremities. Dr. Kroll learned that Mr. Derline's lumbar pain forced him to recline up to 16 hours per  
22 day and spend no more than two hours on his feet, whether standing or walking.  
23

24  
25 **Dr. Dagher:**

26 Dr. Dagher, a physiatrist, examined Mr. Derline a single time on September 10, 2012, and  
27 learned of Mr. Derline's volunteer activities from Mr. Fretts and photos taken during two races.  
28

29 The Department accepted neck sprain, thoracic sprain, lumbar sprain, lumbosacral  
30 spondylosis and degenerative disc conditions. Exhibit No. 1. Dr. Dagher diagnosed only strains of  
31 the lumbar, thoracic and cervical spine.  
32

33  
34 Dr. Dagher testified that the minor disk bulges at L3 through S1 depicted on the January  
35 2004 MRI were evidence of preexisting degenerative disc conditions.  
36

37 Dr. Dagher knew the Department had allowed lumbar spondylosis and cervical and lumbar  
38 disc degenerations as aggravations of the preexisting degenerative disc conditions. Dr. Dagher  
39 testified the aggravation was not permanent.  
40

41 Dr. Dagher testified there was no medical basis for physical restrictions. Dr. Dagher  
42 completed an estimate of physical capacities, admitted as Exhibit No. 9. The estimate stated that  
43 Mr. Derline could sit, stand and walk for 1 to 2 hours up to 3 to 4 hours during an entire 8-hour day.  
44 Dr. Dagher completed the estimate that limited Mr. Derline to bending, squatting, kneeling,  
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1 crawling, climbing, and reaching above shoulder level occasionally. Dr. Dagher testified that his  
2 completion of the estimate was not a statement of physical restrictions.  
3

4 Dr. Dagher testified Mr. Derline could perform the physical activities demanded of a logging  
5 truck driver, lubrication servicer, auto mechanic, general office clerk and NASCAR crew chief.  
6

7 Dr. Dagher rated Mr. Derline's cervical and thoracic spine permanent impairments as equal  
8 to Category 1. (No ratable impairment.) Lumbosacral impairments were equal to Category 1.  
9  
10 Dr. Dagher concluded there was no medical evidence of a permanent change to Mr. Derline's  
11 preexisting arthritic conditions in his cervical, thoracic, and lumbar spine.  
12

### 13 Physical Capacities Evaluations

#### 14 Daniel L. Hughes, DPT

15  
16 Mr. Daniel Hughes earned his doctorate in physical therapy. Dr. Hughes performed a  
17 physical capacity evaluation of Mr. Derline on August 6, 2013. Mr. Derline presented a history of  
18 limitations in performing normal daily activities due to his low back conditions. He was required to  
19 shift positions frequently, use a sit/stand option and recline throughout the day.  
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21

22 Mr. Derline told Mr. Hughes that he volunteered to help a teenage race car driver.  
23  
24 Mr. Derline enjoyed racing despite the increase in symptoms when he volunteered. Mr. Derline  
25 explained to Mr. Hughes that the increase in pain was better than the depression he experienced in  
26 the absence of activity.  
27

28 Mr. Derline felt better when he volunteered to help the teenage racer. Mr. Derline presented  
29 a history to Mr. Hughes of depression and explained that racing was a positive outlet to combat  
30 depression. Mr. Derline was a long-term racecar enthusiast and volunteered with the understanding  
31 that others would perform the physical demands and Mr. Derline would help on race day.  
32  
33 Mr. Hughes did not have an idea of Mr. Derline's activities outside his role as crew chief and  
34 assumed there was some percentage of performing mechanical repair and maintenance work.  
35  
36 Mr. Hughes discussed with Mr. Derline possible ways of volunteering with less pain, requiring fewer  
37 days to recover.  
38  
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40 Mr. Hughes reviewed the surveillance videos, Dr. Worth's progress notes, and four specific  
41 physical capacity evaluations (PCE): PINN PCE dated October 2009, Olympia Physical Therapy's  
42 PCE in July 2006, Apple Physical Therapy's PCE in 2005, and progress notes and discharge  
43 summary of Dr. Kroll in 2011.  
44  
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46 During the PCE performed by Mr. Hughes on August 6, 2013, Mr. Derline walked with  
47 decreased trunk rotation, affecting his gait. His posture was forward with a significant decrease in  
48

1 lumbar lordosis. His left pelvic bone was higher than the right. Tenderness was palpated throughout  
2 Mr. Derline's mid and low back and both hips. Lumbar flexion was 23 degrees; extension was  
3 measured to 4 degrees; right lateral flexion to 15 degrees; and left lateral flexion to 17 degrees.  
4 Mr. Derline could lift and carry 6 pounds from floor to waist, 9 pounds from waist to shoulder, and  
5 5 pounds was the main limiting factor.  
6

7  
8 Mr. Derline could sit for up to 30 minutes at a time in an ergonomic chair, for up to 4 hours a  
9 day in an 8-hour day. Standing and walking was limited to up to 15 minutes at a time and up to  
10 2 hours, in an 8-hour day. Squatting was on a seldom basis, due to his low back pain and lower  
11 extremity weakness. Kneeling and crawling were limited to a seldom basis, mainly due to the  
12 difficulty getting into and out of the kneeling and crawling positions.  
13

14  
15 Bending, twisting, and stooping were limited to a seldom basis. Stair climbing was restricted  
16 to one flight and with the use of a handrail and never carrying any two-handed objects while on  
17 stairs. Ladder climbing was to be avoided due to lumbar pain and leg numbness. Overhead  
18 reaching was restricted to an occasional basis because it was accompanied by extension in the low  
19 back, resulting in more significant pain. Fine finger manipulation and use of hand controls was  
20 unrestricted. Foot controls were limited to low compression demands, but not restricting  
21 Mr. Derline's ability to drive vehicles.  
22

23  
24 Mr. Hughes administered formal consistency testing by testing grip at five different positions  
25 with three repetitive trials. The results were charted and demonstrated a bell-shaped curve,  
26 consistent with full effort and Mr. Derline's age group. Mr. Hughes measured consistent effort by  
27 varying the measurement of range of motion during different body mechanics.  
28

29  
30 Mr. Hughes testified that Mr. Derline had significant limits due to his low back and legs and  
31 was limited to sedentary level of exertions.  
32

33  
34 Mr. Hughes compared the results of the August 6, 2013 PCE with the PCEs performed in  
35 2005 (Apple Physical Therapy), July 2006, (Olympia Physical Therapy), and October 2009, (PINN).  
36 Mr. Hughes testified that significant limitations were also measured in the prior PCEs and the 2013  
37 PCE portrayed a slow progressive decline in his ability levels.  
38  
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#### 40 **DECISION**

41  
42 From June 25, 2011, to March 6, 2013, Mr. Derline sought time-loss compensation benefits.  
43 The preponderance of the evidence was persuasive that Mr. Derline's conditions, proximately  
44 caused and aggravated by the industrial injury of December 29, 2003, were not medically and  
45 vocationally fixed until March 6, 2013. As of March 6, 2013, Mr. Derline sought the status of a  
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1 permanently and totally disabled worker. The only distinction between total temporary disability and  
2 permanent total disability is duration. *Herr v. Department of Labor & Indus.*, 74 Wn. App. 632  
3 (1994).  
4

5 When determining whether a worker is permanently and totally disabled, it is appropriate to  
6 study the whole person, his strengths and weaknesses, age, education, training, experience, and  
7 any other relevant factors that contribute to the ultimate conclusion as to whether he is disqualified  
8 from gainful employment within his relevant labor market. *Fochtman v. Department of Labor &*  
9 *Indus.*, 7 Wn. App. 286, 292 (1972).  
10

11 A permanently and totally disabled worker need not be hopeless or a physically broken  
12 wreck for all purposes except merely to live. *Kuhnle v. Department of Labor and Indus.*,  
13 12 Wn.2d 191,197 (1942). *Spring v. Department of Labor & Indus.*, 96 Wn.2d 914 (1982).  
14

15 The vocational testimony was uncontroverted that Mr. Derline lacked the skills and  
16 capacities necessary to obtain continuous gainful employment within his relevant labor market.  
17

18 Dr. Kroll compared the claimant's physical capacities on January 11, 2011, to the most  
19 recent physical capacities evaluation and Dr. Kroll's evaluation in 2013. Dr. Kroll found Mr. Derline  
20 demonstrated significantly less physical capacity in August 2013. Dr. Kroll concluded that a  
21 sedentary level work on a full-time basis would be the most sustainable. Kroll Dep. at 45.  
22

23 Dr. Kroll testified that Mr. Derline may be able to lift or carry up to 23 pounds but not up to  
24 the 50 pound range as stated by Dr. Dagher. Dr. Kroll testified that Mr. Derline's capacities for lifting  
25 and postural exertions disqualified him from performing the duties of a logging truck driver, auto  
26 mechanic, lubrication servicer and general office clerk. Dr. Kroll explained that the logging truck  
27 driver and auto mechanic positions required lifting and carrying greater than 20 pounds.  
28

29 Mr. Derline testified that a logging truck driver must install cables and stake extensions. This  
30 testimony was consistent with Drs. Worth and Kroll's opinion that Mr. Derline lacked the physical  
31 capacity. Mr. Derline was unable to work as a lubrication servicer because the position required  
32 Mr. Derline to be on his feet continuously and lift up to 40 pounds.  
33

34 Sedentary positions were more suitable according to the testimony of Drs. Worth and Kroll  
35 and the physical therapy testimony of Mr. Hughes. The sedentary clerk position required a  
36 combination of sitting, standing and walking throughout an entire 8-hour day. Mr. Hughes testified  
37 Mr. Derline could sit for 30 minutes at one time and for up to 4 hours in an 8-hour day. Mr. Derline  
38 had preexisting academic deficits in reading and comprehension. Mr. Derline lacked clerical skills  
39 due to the failed training efforts. The preponderance of the evidence was persuasive that  
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1 Mr. Derline was incapable of performing the demands of a general office clerk, even if he had the  
2 skills, which he did not possess due to the failed training efforts.

3  
4 Special consideration was given the testimony of the attending physician. Drs. Worth and  
5 Kroll were better informed of Mr. Derline's conditions and resulting limitations due to their  
6 observations of Mr. Derline during multiple clinical examinations. Their opinions rested on a  
7 foundation well grounded in all material facts.  
8

9  
10 The vocational testimony of Ms. Linker and Ms. Fortman was uncontroverted. Considering  
11 Mr. Derline's physical and vocational status, his conditions were not fixed until March 6, 2013.

12  
13 The preponderance of the evidence was persuasive that Mr. Derline was incapable of  
14 performing and obtaining continuous gainful employment from June 25, 2011, through March 6,  
15 2013. As of March 6, 2013, Mr. Derline was a permanently and totally disabled worker.

16  
17 The Department order dated March 6, 2013, that affirmed the Department order dated  
18 February 5, 2013, in which the Department closed the claim with time-loss compensation benefits  
19 as paid through June 24, 2011, was incorrect and should be reversed.  
20  
21

22 **FINDINGS OF FACT**

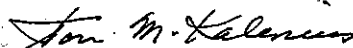
- 23  
24 1. On September 24, 2013, and November 18, 2013, an industrial appeals  
25 judge certified that the parties agreed to include the Jurisdictional  
26 History in the Board record solely for jurisdictional purposes.
- 27 2. Neil W. Derline sustained an industrial injury on December 29, 2003,  
28 when he drove a logging truck and struck a guardrail, resulting in lumbar  
29 spondylosis, cervical and lumbar disc degenerations proximately caused  
30 or aggravated by the industrial injury.
- 31 3. Mr. Derline was born on May 20, 1955, graduated from high school in  
32 1973 and a mechanical training course in 1976. Mr. Derline worked as a  
33 mechanic and as a truck driver. Mr. Derline had pre-existing  
34 degenerative disc conditions and unrelated conditions of high blood  
35 pressure, thyroid disorder, a hernia repair, an appendectomy, coronary  
36 artery disease, left epicondylitis, and reading and comprehension  
37 deficits.  
38
- 39 4. Mr. Derline was capable of lifting and carrying 6 pounds from floor to  
40 waist 9 pounds from waist to shoulder and 5 pounds was the limiting  
41 factor. Mr. Derline could sit for 30 minutes at a time and for 4 hours a  
42 day in an 8-hour day. Standing and walking were limited to up to  
43 15minutes at a time and up to 2 hours in an 8-hour day. Bending,  
44 twisting, stooping, squatting, kneeling and crawling were only to be  
45 performed on a seldom basis. Overhead reaching was restricted to an  
46 occasional basis. Mr. Derline's limitations were proximately caused by  
47 the industrial injury, from June 25, 2011, through March 6, 2013.  
48

- 1 5. Mr. Derline was unable to perform or obtain gainful employment on a  
2 reasonably continuous basis from June 25, 2011, through March 5,  
3 2013, due to the residuals of the industrial injury and taking into account  
4 the claimant's age, education, work history, and preexisting conditions.  
5  
6 6. Mr. Derline was unable to perform or obtain gainful employment on a  
7 reasonably continuous basis as of March 6, 2013, due to the residuals  
8 of the industrial injury and taking into account the claimant's age,  
9 education, work history, and preexisting conditions.  
10  
11 7. As of March 6, 2013, Mr. Derline's conditions proximately caused by the  
12 industrial injury were fixed and stable.

13 **CONCLUSIONS OF LAW**

- 14 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
15 parties and subject matter of this appeal.  
16  
17 2. Mr. Derline was a temporarily totally disabled worker within the meaning  
18 of RCW 51.32.090 from June 25, 2011, through March 5, 2013.  
19  
20 3. Mr. Derline was a permanently totally disabled worker within the  
21 meaning of RCW 51.08.160, as of March 6, 2013.  
22  
23 4. The Department order dated March 6, 2013, is incorrect and is reversed.  
24 This matter is remanded to the Department to pay time-loss  
25 compensation benefits from June 25, 2011, through March 5, 2013, and  
26 find Mr. Derline permanently totally disabled as of March 6, 2013.

27 DATED:           MAR 13 2014          

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31 Tom M. Kalenius  
32 Industrial Appeals Judge  
33 Board of Industrial Insurance Appeals  
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