BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RANDY L. BROWN	**DOCKET NOS. 09 14595 & 09 17896**
CLAIM NO. AC-99173	**PROPOSED DECISION AND ORDER**

INDUSTRIAL APPEALS JUDGE: Jamie M. Moore

APPEARANCES:

Claimant, Randy L. Brown, by
Williams, Wyckoff & Ostrander, PLLC, per
Douglas P. Wyckoff

Employer, Mason County Auditor, by
Sedgwick CMS,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Sarah E. Kortokrax, Assistant

In Docket No. 09 14595, the claimant, Randy L. Brown, filed an appeal with the Board of Industrial Insurance Appeals on April 30, 2009, from an April 10, 2009 decision contained in a Department of Labor and Industries letter. In the letter, the Department found Mr. Brown was able to return to work in the job of lube technician,[1] could no longer be offered a vocational assessment, and that time-loss compensation benefits had ended. The decision contained in the April 10, 2009 Department letter is **REVERSED AND REMANDED**.

In Docket No. 09 17896, the claimant filed an appeal with the Board of Industrial Insurance Appeals on July 27, 2009, from an order of the Department of Labor and Industries dated July 24, 2009. In this order, the Department affirmed an order dated May 15, 2009, in which it closed the claim with an award for permanent partial disability equal to Category 4 permanent dorso-lumbar and/or lumbosacral impairments. The July 24, 2009 Department order is **REVERSED AND REMANDED**.

PROCEDURAL AND EVIDENTIARY MATTERS

On June 10, 2009, and on November 3, 2009, the parties agreed to include the Jurisdictional History in the Board's record. That history establishes the Board's jurisdiction in these appeals.

[1] The terms lubrication or lube technician and lubrication or lube servicer are used interchangeably by the parties and witnesses throughout the record. For ease of reference, this Proposed Decision and Order will use the term lube servicer.

On November 3, 2009, at the hearing, the claimant presented his own testimony and that of Karin L. Larson.

The claimant presented the deposition of William L. Linnenkohl, MPT, taken to perpetuate his testimony on October 19, 2009. This deposition is published pursuant to WAC 263-12-117. The motion to strike at page 20 is granted, and the testimony at page 20, lines 14–17, is stricken. All objections are overruled and all other motions are denied. The deposition contains proposed Exhibit No. 1, the job analysis prepared by Ms. Larson. The exhibit is renumbered Exhibit No. 4, and is rejected as the document was previously admitted to the record at hearing as Exhibit No. 2.

The claimant presented the deposition of Robert Gilmer Ross Lang, M.D., taken to perpetuate his testimony on October 28, 2009. This deposition is published pursuant to WAC 263-12-117. All objections are overruled and all motions are denied. The deposition contains proposed Exhibit No. 1, the job analysis prepared by Ms. Anderson, and proposed Exhibit No. 2, the job analysis prepared by Ms. Larson. The exhibits are renumbered as Exhibit Nos. 5 and 6, respectively, and are rejected as the documents were admitted to the record at hearing as Exhibit Nos. 1 and 2.

On November 4, 2009, at the hearing, the Department presented the testimony of Jeannette Anderson.

The Department presented the deposition of Ronald L. Vincent, M.D., taken to perpetuate his testimony on November 30, 2009. This deposition is published pursuant to WAC 263-12-117. There were no objections or motions made.

The November 4, 2009 hearing transcript at page 41, line 20 is corrected to reflect that the witness' answer was "correct" and the next sentence beginning with "And that's the same as . . ." is a question, not part of the witness' answer.

CASE HISTORY

A summary of the history of this case is necessary for a complete understanding. On July 17, 2009, an initial scheduling conference under Docket No. 09 14595 was held, and on July 27, 2009, an Interlocutory Order Establishing Litigation Schedule was issued. The order set forth the issues as follows:

1. Whether the claimant is entitled to time-loss compensation benefits as of April 9, 2009.[2]

[2] The Interlocutory Order Establishing Litigation Schedule provided that the claimant was required to identify the precise period for which time-loss compensation benefits were sought in his witness confirmation letter.

2. Whether the claimant is entitled to further proper and necessary medical treatment.[3]

3. Whether the Department properly set the claimant's time-loss compensation rate.[4]

Subsequently, the claimant's appeal of the July 24, 2009 Department closing order was assigned Docket No. 09 17896, and as anticipated, that appeal was consolidated with the appeal under Docket No. 09 14595. The claimant's July 27, 2009 Notice of Appeal raised the issue of total permanent disability. However, the Interlocutory Order Establishing Litigation Schedule was not amended prior to hearing.

At the November 3, 2009 hearing, the parties discussed the appeal issues. The claimant identified the period of April 10, 2009, through July 24, 2009, in relation to time-loss compensation benefits sought. The claimant abandoned the issue of treatment. The claimant did not concede fixity, but asked to have the closing order reversed. The hearing record indicates there were off-record discussions of the issues, but does not reflect discussion as to the issue of pension.

The perpetuation deposition filing deadline for both the claimant and the Department was December 18, 2009. However, the last perpetuation deposition was received on December 10, 2009, and the hearing record closed on that date. On December 11, 2009, the Department submitted a letter resting its case. On December 15, 2009, the claimant, through counsel, submitted a letter dated December 14, 2009, to the hearings judge, requesting a pension[5].

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[3] The Interlocutory Order Establishing Litigation Schedule provided further: "I note that the order under appeal is an appeal from an order terminating time-loss compensation benefits. At the conference, the parties advised that the Department is expected to issue a closing order, and the claimant will promptly appeal and notify me so this other appeal can be consolidated with the instant appeal, hence the listing of treatment as an issue for purposes of scheduling."

[4] The issue of the claimant's time-loss compensation rate, appealed under Docket No. 09 17795, was resolved by agreement prior to hearing.

[5] The December 14, 2009 letter provided as follows:

> You may recall at the final hearing on this matter, you made inquiries about the remedies being requested by the injured worker in the above-referenced docket numbers. At the time, I indicated that even though Mr. Brown was not presenting any evidence about the need for further treatment, I was hesitant to request the remedy of total permanent disability. It was my belief there may be evidence that Mr. Brown could be retrained for some occupation not specifically known at the time. Now that the evidence is now all completed, my opinion has changed.
>
> Given the fact that the only evidence presented is Mr. Brown's ability to perform the occupation of lubrication technician; I believe the remedy of a pension is appropriate in these docket numbers. In other words, if you conclude that Mr. Brown is not capable of performing that specific occupation, on a full time, continuous basis, I believe the pension remedy would be appropriate.

On February 19, 2010, Industrial Appeal Judge Brian Watkins issued a Proposed Decision and Order (PDO). The PDO treated the claimant's December 14, 2009 letter as a motion to add pension to the relief sought in the appeal; denied the motion as untimely;[6] and affirmed the Department's April 10, 2009 letter and May 15, 2009 closing order.

On April 5, 2010, the claimant filed a Petition for Review with the Board. On April 30, 2010, the Department filed a Response to Petition for Review. On May 7, 2010, the Board issued an Order Vacating Proposed Decision and Order and Remanding the Appeal for Further Proceedings which provided in relevant part as follows:

> We are remanding the appeals to the hearing process so that the parties can litigate Mr. Brown's entitlement to a pension . . . .
>
> Any disadvantage to the Department or the employer is far outweighed by the disadvantage to the injured worker who may not have another opportunity to request a pension. The disadvantage can be easily mitigated by allowing the parties to be heard on the limited issue of **permanent** total disability versus **temporary** total disability. We remind the parties that the difference between temporary total disability and permanent total disability is only the duration of the disability. The parties have presented their evidence of total disability. We do not anticipate that on remand, the parties will re-litigate the issue of total disability. The remand is for the limited purpose of presenting evidence, if necessary, or argument, on duration of disability.

The appeal was sent back to the hearing process. On June 29, 2010, a scheduling conference was held and an Amended Interlocutory Order Establishing Litigation Schedule was issued. The issue was identified as follows:

> What, if any, is the duration of the claimant's total disability, if any, due to the residual impairment proximately caused by the industrial injury of November 6, 2008, as of July 24, 2009, as contemplated by RCW 51.08.160?

On July 8, 2010, a Second Amended Interlocutory Order was issued rescheduling hearing time. The parties proceeded to prepare for hearing by confirming witnesses and scheduling depositions. On August 24, 2010, the claimant filed a Motion for Summary Judgment.

On September 21, 2010, a conference was held to discuss the summary judgment motion. At the conference, the claimant and the Department agreed to provide no further evidence and to rest on the record, and the claimant agreed to withdraw the Motion for Summary Judgment. On September 21, 2010, I issued a letter summarizing the agreements of the parties, canceling the live

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[6] The PDO also noted consideration of a pension for the claimant would be unjust to the employer and Department as they did not have notice of the claimant's request for a pension until after the litigation ended.

hearing time, and setting a submission deadline for the Department's briefing. On September 23, 2010, the claimant's attorney filed a letter summarizing his understanding of the agreement, and resting his case. On October 12, 2010, the Department submitted its Post Hearing Brief, effectively resting its case. The record closed on October 12, 2010.

ISSUES

1. Whether the claimant was a temporarily and totally disabled worker between April 10, 2009, and July 23, 2009, inclusive, due to the residual impairment proximately cause by his November 6, 2008 industrial injury.
2. Whether the claimant was a totally and permanently disabled worker, due to the residual impairment proximately caused by the industrial injury of November 6, 2008, as of July 24, 2009, as contemplated by RCW 51.08.160?

EVIDENCE PRESENTED

Karin L. Larson

Karin L. Larson is a vocational rehabilitation counselor. Ms. Larson performed a forensic review of Mr. Brown's case. She understood Mr. Brown's job of injury was that of a sign technician for Mason County, and that Mr. Brown had prior work experience as a diesel and automobile mechanic. Ms. Larson reviewed physical capacities evaluations from January 2009, and October 2009, and medical records from Dr. Lang.

From the medical records, Ms. Larson understood Mr. Brown sustained a November 2008 low back injury; had a pre-existing spinal fusion at L4-L5 and L5-S1; had a pre-existing cervical fusion; had previous carpal tunnel syndrome surgery; and had other conditions. After the industrial injury, Dr. Lang disapproved of Mr. Brown's ability to work as a sign technician. Dr. Lang, however, approved the job of lube servicer for Mr. Brown.

From the physical capacities evaluations (PCEs), Ms. Larson understood Mr. Brown would need to change positions every 30 to 40 minutes, (as of January 2009) and every 45 to 50 minutes, (as of October 2009). The PCEs also indicated in an eight-hour day, Mr. Brown can stand three to four hours and walk two to three hours, but only up to 30 minutes at a time. The January 2009 PCE showed Mr. Brown could perform a bilateral lift of 30 pounds from floor to waist, 40 pounds from waist to shoulder, and 30 pounds from shoulder to overhead. The October 2009 PCE showed he was able to bilaterally lift 60 pounds occasionally from floor to waist, 40 pounds from waist to shoulder, and 40 pounds from shoulder to overhead.

In her forensic review, Ms. Larson did not conduct a labor market survey, and did not meet with Mr. Brown. Ms. Larson contacted employers in the Olympia area including Express Lube and

two Jiffy Lubes, and conducted on-site observations in Aberdeen and Hoquiam. In the past, Ms. Larson researched the lube servicer job in Thurston County. Ms. Larson also gathered information of lube servicer duties from the Department of Labor.

Ms. Larson testified to the conclusion reached by Jeannette Anderson, the vocational counselor assigned by the Department to Mr. Brown's case. Ms. Anderson concluded Mr. Brown was physically unable to return to the job of sign technician, but that he was able to work as an automobile lube servicer. Ms. Anderson based her conclusion on the lube servicer job description, and on Mr. Brown's transferable skills and physical capabilities as evidenced by medical information. However, Ms. Anderson did not take note of Mr. Brown's pre-existing conditions in her vocational closing report.

Ms. Larson is familiar with the lube servicer job position, having looked at that job as a transferable position for other workers, having observed lube servicers at work, and having prepared job analyses in the past for this occupation. She examined the lube servicer job analysis prepared by Ms. Anderson in this case, and took exception to the standing/walking tolerances noted. Ms. Larson took issue with the job analysis because it provided a lube servicer must stand and walk four to five hours per day, and Ms. Larson's understanding is the job requires standing and walking throughout the day; because it provided a lube servicer would stand zero to five minutes at a time, and that did not make sense to her; and because it did not indicate what an employee would be doing the remaining three or four hours of the work day if not standing or walking.

Ms. Larson also took issue with the lube servicer job analysis provisions regarding upper extremity and hand function. The job analysis in this case provided that the job requirement of a worker to reach above the shoulder is rare to occasional. Ms. Larson believes the job required frequent reaching rather than rare to occasional reaching. Ms. Larson explained while lube servicers work both in a pit and in an upper bay when changing oil, pit workers remain in the pit all day, and do not alternate out to the upper service bay. Overhead reaching is necessary to check wheels and lubricate parts whether a car is over a pit or on jacks, and lube servicers reach over 100 times per day. Ms. Larson understood entry-level hires for this job typically work in the pit.

Lastly, Ms. Larson took issue with the occasional (30 percent of the day) bending requirement noted in the job analysis. She explained a lube servicer could work on thirty or forty cars a day and that bending would be done throughout a work day.

For this case, Ms. Larson updated a previously created job analysis for lube servicer, and included job requirements of constant standing and walking (except for break and lunch times;) frequent bending, stooping, reaching from waist to shoulder, and reaching below the knee; and lifting tires (since some lube centers also deal with tires weighing up to 100 pounds.)

Ms. Larson opined that, although Mr. Brown had the transferable skills to perform the lube servicer job, as of April 10, 2009, he would not have been able to perform the job of lube servicer on a reasonably continuous basis. She based her opinion on the standing, walking, overhead reaching, lifting, and bending requirements of the job and Mr. Brown's physical restrictions considering both his pre-existing conditions and his industrial injury. Ms. Larson further opined, as of April 10, 2009, Mr. Brown is not capable of obtaining reasonably continuous gainful employment in any transferable skills jobs or previously held jobs. Ms. Larson explained Mr. Brown needs assistance to be employable again, and she would have recommended plan development services in his case. However, on cross-examination, Ms. Larson agreed that Mr. Brown was able to work at a light-to-medium capacity.

Randy Brown

Randy Brown was 58 years old at the time of his November 3, 2009 testimony. Mr. Brown is 5 feet 10 inches tall and weighs approximately 220 pounds, which is 10 to 15 pounds more than he weighed at the time of his November 6, 2008 industrial injury. Mr. Brown graduated from high school, served in the U.S. Marine Corps as a radio relay operator, and served in the U.S. Army as a vehicle mechanic. He has worked in construction, and worked extensively as a mechanic on cars, trucks and farm equipment. Mr. Brown testified he had intended to work to age 65.

Mr. Brown worked for the Mason County Road Department. In October 2007, Mr. Brown was off work due to another injury. On his doctor's advice to obtain a less physically demanding job, Mr. Brown took the job of sign technician with the County. Mr. Brown was trained to perform the job duties: primarily installing and maintaining road signs.

On November 6, 2008, while carrying signs, Mr. Brown caught a sign on a building corner, his feet slipped, and something hurt in his back. The next morning he could hardly move, and could barely bend. He sought treatment with Dr. Lang, who provided pain medication, a referral to physical therapy, and an x-ray. Mr. Brown received primarily conservative treatment. Mr. Brown testified there was no light duty work as a sign technician, and he has not worked since the date of the industrial injury.

As a result of the November 6, 2008 industrial injury, Mr. Brown cannot stand or walk like he could before the injury. He cannot lift as much. He does normal household chores, but has a hard time mowing the lawn and vacuuming. Mr. Brown testified he can bend and stand, but if he does too much he will be in pain for a couple of days following the exertion.

Mr. Brown had pre-existing work-related back injuries and has had four low back surgeries, including two fused discs in his low back. He suffered a neck injury more than ten years before his testimony, and had a cervical fusion. He had carpal tunnel syndrome surgery in both hands about eight years before his testimony. In November 2008, prior to the industrial injury, Mr. Brown had a stroke, and as a result does not think as clearly as he used to, but has no resulting paralysis

Mr. Brown testified concerning his January 2009 and October 2009 physical capacities evaluations. He agreed with the standing limitations of 30 minutes at a time, 2 to 3 hours in an 8 hour day; and with the lifting limitations of 40 pounds. Mr. Brown also agreed that his ability to bend forward was severely restricted, and he attributed his bending difficulties to his prior back injuries.

Mr. Brown met Jeannette Anderson, his assigned vocational counselor, two times. He told Ms. Anderson about his back surgeries and his cervical fusion. Mr. Brown and Ms. Anderson discussed his transferrable job skills, and the lube servicer job. Mr. Brown explained to Ms. Anderson that his neck condition prevented him from looking up all day.

Mr. Brown explained he had done the job of lube servicer when he worked for Mason County. Mr. Brown noted there is no place for a lube servicer to sit in a pit; the pit job requires overhead work more than one-third of the day; and the upper bay work requires bending all the time. Based upon his experience working in a pit performing the duties of a lube servicer, and his knowledge of working under the hood of a car in the upper bay, Mr. Brown did not think he could perform the job on a full-time, continuous basis due to his neck condition and bending difficulties associated with his low back condition. While Mr. Brown sometimes had problems lifting overhead before the industrial injury, he never had a job where he worked overhead frequently.

Jeannette Anderson

Jeannette Anderson is a vocational rehabilitation counselor. At the request of the Department, Ms. Anderson performed a vocational assessment of Mr. Brown consisting of an early intervention assessment to see if he could return to his job-of-injury, followed by a return to work assessment which looked at his transferable skills, education and physical restrictions. Ms. Anderson determined that, based upon his physical capacities, Mr. Brown could not return to

his job-of-injury. Ms. Anderson opined that Mr. Brown was, however, employable as a lube servicer due to his transferable skills.

In formulating her opinion, Ms. Anderson relied on Mr. Brown's physical capacities evaluation (PCE) and on information from Dr. Lang. The PCE showed Mr. Brown could lift 30 pounds occasionally and 15 pounds frequently from shoulder to overhead. The PCE led Ms. Anderson to conclude Mr. Brown could reach frequently. She did not note any reference to overhead reaching, and did not feel there was anything in her job analysis that would prompt her to seek a further PCE.

In her vocational assessment, Ms. Anderson used a lube servicer job analysis created by Milana Attison, another vocational rehabilitation counselor, to evaluate Mr. Brown's employability. On January 13, 2005, Ms. Anderson conducted a labor market survey for the job of lube servicer, and looked at five employers consisting of three Jiffy Lubes, one Express Lube, and one Oil Can Henry's. Ms. Anderson's colleague updated the labor market survey.

The job analysis showed lube servicers are required to occasionally lift up to two pounds, and to rarely lift two to ten pounds. The lube servicers drain oil from vehicles; check and change fluids; change oil and air filters; clean car interiors and/or windows; and replace wiper blades, if necessary. They may stock merchandise, clean up, and sometimes change, but not mount tires. A lube servicer is either standing or walking all day during work. During a half-hour oil change, the pit worker would spend 10 minutes working over head, and the other 20 minutes waiting for oil to drain, cleaning, and stocking.

Mr. Brown expressed concerns to Ms. Anderson about the lube servicer job. Ms. Anderson was aware of Mr. Brown's pre-existing conditions, but made no reference to what those conditions were in her report because he had returned to work as a sign technician with those pre-existing conditions. Ms. Anderson first opined Mr. Brown's physical abilities as evidenced by his PCE were consistent with the physical demands of the lube servicer job. However, she noted that the PCE restricts standing to two to three hours, and conceded the PCE was inconsistent with the job analysis regarding standing and walking.

Ms. Anderson testified that workers at Oil Can Henry's frequently work above their head, which is consistent with Ms. Larson's labor market information. Ms. Anderson, however, understood lube servicer workers spent only part of the work day, not all of it, working in the pit. On cross-examination, Ms. Anderson acknowledged that the PCE for Mr. Brown prepared by Mr. Linnenkohl indicated that during the evaluation Mr. Brown repeatedly experienced pain in his

neck due to overhead reaching, and his bending was restricted in relation to increased low back pain. Ms. Anderson explained her opinion as to the appropriateness of the lube servicer job for Mr. Brown was not changed by the differences between her job analysis and the job analysis created by Ms. Larson. Ms. Anderson conceded there are no other suggested jobs that Mr. Brown could do, but opined Mr. Brown has transferable skills to work as a lube servicer.

William L. Linnenkohl

William L. Linnenkohl is a physical therapist with Olympia Physical Therapy. In January 2009 Mr. Linnenkohl evaluated Mr. Brown and determined he could perform light to medium duty work, lifting 25 to 35 pounds on an occasional basis. The physical capacities evaluation (PCE) revealed Mr. Brown could lift 30 pounds floor to waist, 40 pounds waist to shoulder, and 30 pounds overhead; could carry 30 pounds for 50 feet; and could push-pull 25 pounds. Mr. Linnenkohl reported Mr. Brown was limited by pain in his low back and neck, and that Mr. Brown gave his best effort during the PCE.

In October 2009, Mr. Linnenkohl performed a second PCE of Mr. Brown at the request of Mr. Brown's attorney. In the second PCE, Mr. Linnenkohl tried to mimic the tasks described in Ms. Larson's lube servicer job analysis. Mr. Brown used of a number of stations in the work hardening clinic, and performed activities such as working overhead with nuts and bolts, and working over a table to simulate working under the hood of a car. While Mr. Brown's lifting abilities increased from the January 2009 PCE results, he was only able to occasionally work overhead, stoop and bend, and started to have neck problems and low back pain. Mr. Brown could lift 60 pounds floor to waist, 40 pounds waist to shoulder, and 40 pounds overhead; could carry 50 pounds for 50 feet; and could push-pull 40 and 50 pounds. Mr. Linnenkohl concluded the tests were valid, and again, Mr. Brown gave a good effort during the PCE.

Mr. Linnenkohl reviewed the two job analyses in this case, and agreed with Ms. Larson's job analysis which provided when working down in a pit, a worker must frequently look up and reach overhead as opposed to Ms. Anderson's job analysis which provided the job of lube servicer required rare to occasional reaching above the shoulder. Based upon his prior knowledge of the job of lube servicer, and the requirements of workers to work in a pit, extend their necks and reach overhead with their hands, Mr. Linnenkohl did not understand how Ms. Anderson could say that the work requires only rare to occasional work above the shoulder.

Mr. Linnenkohl concluded on a more-probable-than-not basis that Mr. Brown was unable to perform the essential functions of the lube servicer job, because he was not able to work or reach

overhead on a frequent basis. Mr. Linnenkohl also concluded Mr. Brown couldn't perform the job because he has difficulty stooping and bending on a frequent basis.

Robert Gilmer Ross Lang, M.D.

Robert Gilmer Ross Lang, M.D. is licensed and certified neurosurgeon. On July 20, 2007, Dr. Lang initially saw Mr. Brown due to an injury sustained while cutting trees for Mason County PUD. Dr. Lang understood Mr. Brown had at least three back surgeries in the late 1990s, and had a lumbar fusion at L4-L5 and at L5 to sacrum, resulting in rigid fixation at those levels. Mr. Brown also had a neck fusion in 1990. Dr. Lang treated Mr. Brown for this injury, and understood Mr. Brown continued doing his job with difficulty. Dr. Lang also understood Mr. Brown changed jobs, and took a lighter job, that of sign technician. Dr. Lang explained at this time Mr. Brown was flexing 90 degrees, had normal range of motion in his lower back and no weakness. Mr. Brown continued to be seen periodically by nurse practitioners associated with Dr. Lang and was treated for back pain flare-ups with medication.

On November 6, 2008, Mr. Brown slipped and twisted his back while working as a sign technician. Dr. Lang saw Mr. Brown following this injury and noted he had pain in his lower back across the belt line, extending into the right hip and down the front and side of the right thigh, as well as numbness in the front of his thigh. Mr. Brown also had some weakness in his lower back at the left L5 nerve root, the level of his fusion. Dr. Lang took Mr. Brown off work, and helped him file an industrial insurance claim.

On November 26, 2008, Dr. Lang reviewed Mr. Brown's lumbar spine x-rays which suggested some of the bone placed in the fusion surgical process had been absorbed between L4 and sacrum, indicating his lumbar fusion wasn't entirely solid. Dr. Lang also reviewed Mr. Brown's March 14, 2007 lumbar MRI report evidencing the fusion. The pain symptoms and imaging led Dr. Lang to conclude Mr. Brown had an irritated right L3 nerve root. Dr. Lang prescribed medication to help with discomfort and treat the inflammation.

Mr. Brown continued to have ongoing symptoms including pain in both sides of his neck, the back of his head, his right thigh, and headaches. Mr. Brown then suffered a stroke, but recovered extremely well.

In January 2009, Dr. Lang ordered the physical capacities evaluation (PCE) performed by William Linnenkohl at Olympia Physical Therapy. Dr. Lang noted the PCE caused Mr. Brown soreness and pain, and relied on the PCE findings in rendering his opinions at the hearing.

In February 2009, Dr. Lang reviewed and approved the lube servicer job analysis provided by Ms. Anderson, noting as follows:

> "Technically the job is within the capabilities of patient according to PCE. However, he states that he would constantly be looking upwards and this would aggravate his neck pain; constant bending over the engine would increase low back pain; lifting may actually be heavier than 40 pounds with some of the oil containers as well as lifting trash into the dumpster."

Lang Dep. at 12–13.

In October 2009, following Dr. Lang's approval of the lube servicer job analysis, Mr. Brown had the second PCE. Dr. Lang reviewed the October 2009 PCE at the hearing, and agreed with Mr. Linnenkohl's conclusion that Mr. Brown would be restricted for overhead work due to his low back and cervical conditions. Dr. Lang reviewed the lube servicer job analysis prepared by Ms. Larson. Dr. Lang had also seen lube servicers work at a "Jiffy Lube" type of business, including pit work, and in this regard was familiar with the job activities. Dr. Lang explained that if the first job analysis described considerable overhead work and bending over an engine, it would have been a concern for him. Dr. Lang relied on the vocational counselor to accurately describe the job, but felt there was a disconnect between the lube servicer job analysis, and what he anticipated Mr. Brown would have to do as a lube servicer. Dr. Lang acknowledged he has not observed a lube servicer work for an entire day.

Dr. Lang opined Mr. Brown could not work as a lube servicer because the job required frequent overhead reaching and repetitive, frequent and sustained bending to look under the car, make repairs, and change oil. The overhead reaching and bending activities would not be possible for Mr. Brown due to his prior surgeries including the lumbar fusion and to his ongoing complaints of neck pain. The required bending would heighten the risk of further injury because it would put a lot of stress on Mr. Brown's low back at L-3 to L-4. Dr. Lang does not believe Mr. Brown could perform the essential functions of the lube servicer job as those functions are described in the job analysis prepared by Ms. Larson.

Dr. Lang opined the October 2009 PCE, and its findings and restrictions, would apply to April 2009 time frame, and noted the PCE findings concur with Mr. Brown's representations of his abilities. Dr. Lang acknowledged Mr. Brown's physical capabilities, specifically lifting, were better according to the October 2009 PCE than in the January 2009 PCE. However, the improvement did not change Dr. Lang's opinion of Mr. Brown's inability to perform the lube servicer job because the job was not within Mr. Brown's capabilities. Further, Dr. Lang explained his opinion concerning

Mr. Brown's inability to work as a lube servicer was based on primarily on his medical experience and Mr. Brown's previous spinal surgeries, rather than on the physical capacities evaluation.

Dr. Lang opined Mr. Brown was fixed and stable as of March 2, 2009, and could perform full-time work in a light capacity within the physical capabilities as set forth in the PCE. Dr. Lang also opined that Mr. Brown's injuries were cumulative, and thus that his most recent industrial injury was related to his incapacity.

Ronald L. Vincent, M. D.

Ronald L. Vincent, M. D., is a licensed and certified neurologist. On March 2, 2009, as part of an evaluation, Dr. Vincent examined Mr. Brown and reviewed his medical records relevant to Mr. Brown's back condition.

The medical records showed in 1998, Mr. Brown had an injury which exacerbated his degenerative disk and joint disease of the spine. He had a surgical fusion and decompression which was complicated by pseudomeningocele, a result of laceration of the covering of the Cauda Equina. Subsequently Mr. Brown had a herniated disk in his neck resulting in surgery. Mr. Brown was given a Category 4 rating for dorso-lumbar and lumbosacral impairments as they related to that injury under a different industrial insurance claim.

On January 22, 2007, Mr. Brown had another work related injury due to twisting his back. Dr. Vincent understood Mr. Brown had an MRI and an EMG, and was treated by Dr. Lang. Mr. Brown's primary neurological finding was some residuals of a left ankle reflex being absent. The industrial insurance claim related to this injury was closed with no change to Mr. Brown's previous Category 4 rating for dorso-lumbar and lumbosacral impairments.

Dr. Vincent understood Mr. Brown slipped and suffered a low back industrial injury on November 6, 2008. At the March 2, 2009 examination, Mr. Brown presented to Dr. Vincent with pain complaints in his back and right leg including the thigh. Mr. Brown had last seen his own doctor in January 2009. He reported that since that examination he had limitations from activity and worsening pain through each day, but remained stable. Dr. Lang had diagnosed Mr. Brown with lumbar sprain/strain and lumbar radiculopathy with symptoms of back and right leg pain, but no leg weakness. Dr. Vincent also understood that in October 2008, Mr. Brown suffered a stroke which altered his affect and personality.

Dr. Vincent performed a neurologic examination of Mr. Brown. He noted Mr. Brown had normal gait; was able to perform tandem walking without difficulty; had full muscle strength; had symmetrical intact reflexes at his knees, but a 1+ reflex at the right ankle and absent at the left

ankle; normal Babinski's test results; and some sensory changes which were diminished in the left lower extremity.

Dr. Vincent testified as to the findings of the orthopedic examination performed by Dr. Fife on the same date. Dr. Fife found Mr. Brown to have some flattening of the thoracolumbar spine; no evidence of trip or antalgic gait; slow bending forward with flex to 90 degrees; right and left lateral bending reduced to 20 degrees above the fusion level; rotation reduced to 20 degrees; no objective sign of muscle spasm on palpation; free range of motion of lower extremities; painless range of motion in upper extremities of his head and neck; and the ability to do a full squat and return to upright position without difficulty.

Based on his examination and review of Mr. Brown's medical records, Dr. Vincent diagnosed (1) pre-existing history of the 1998 injury and subsequent surgery including spinal fusion; (2) lumbar strain for the injury of record that did not aggravate his pre-existing condition on a more-probable-than-not basis; and (3) a stroke. Dr. Vincent also concluded Mr. Brown's condition was fixed and stable, and there was nothing demonstrated that would increase his previous Category 4 impairment of the dorso-lumbar and lumbosacral spine based on WAC 296-20-280.

Dr. Vincent agreed with the light to light-medium work restrictions from the January 2009 PCE of Mr. Brown, but felt the restrictions were due to his pre-existing conditions and that Mr. Brown would have no work restrictions based solely on his industrial injury. Dr. Vincent opined Mr. Brown could return to his job of injury as the work restrictions were the same after the November 6, 2008 industrial injury as before, and there were no objective findings. Dr. Vincent had not seen a job analysis for Mr. Brown's job of injury, and was unaware the Department determined Mr. Brown could not return to his job of injury. Dr. Vincent reviewed the lube servicer job analysis prepared by Ms. Anderson and opined Mr. Brown was capable of performing that job as of May 15, 2009. However, on cross-examination, Dr. Vincent explained that his approval of the lube servicer job did not factor in any restrictions due to Mr. Brown's pre-existing conditions.

DISCUSSION

In an appeal before the Board, the appellant has the burden of proceeding with evidence to establish a prima facie case for the relief sought in such appeal. RCW 51.52.050; WAC 263-12-115(2). Once a prima facie case is established, a claimant must then establish his entitlement to contested benefits by a preponderance of the evidence. Although the industrial insurance laws are remedial in nature and are to be liberally construed, he must satisfy this strict

and unyielding burden of proof requirement. *Olympia Brewing Co. v. Department of Labor & Indus.*, 34 Wn.2d 498 (1949).

Mr. Brown is seeking time-loss compensation benefits from April 10, 2009, through July 23, 2009, and a pension thereafter. Under RCW 51.32.090, workers may receive time-loss compensation benefits when the residuals of an industrial injury render them totally and temporarily disabled. An injured worker's eligibility for temporary total disability is determined by considering the same factors that are utilized to ascertain permanent total disability since the only difference between the two benefits is the duration of the disability. *Bonko v. Department of Labor & Indus.*, 2 Wn. App. 22 (1970). The test for assessing temporary and/or permanent total disability is to be individualized and requires consideration of an injured worker's strengths and weaknesses with a focus upon employability. *Fochtman v. Department of Labor & Indus.*, 7 Wn. App. 286 (1972). In order to be permanently and totally disabled, an injured worker must prove that he or she is permanently unable to obtain or perform any gainful activity in the relevant competitive market on a reasonably continuous basis. RCW 51.08.160; *Adams v. Department of Labor & Indus.*, 128 Wn.2d 224 (1995).

Therefore, the claimant must show, by a preponderance of the evidence, that an industrial injury considered along with the factors of his age, education, work experience, training, transferable skills, and pre-existing conditions, if any, prevent him from obtaining and performing gainful employment. The evaluation of his assertion that he was temporarily, totally disabled from April 10, 2009, and July 23, 2009, and permanently, totally disabled thereafter, is not restricted to merely ascertaining a loss of function and disability; it also necessitates consideration of his ability to obtain or perform employment on a reasonably, continuous basis. *Leeper v. Department of Labor & Indus.*, 123 Wn.2d 803 (1994).

Mr. Brown, a man in his late 50's, has been primarily employed during his adult life as a mechanic. Aside from the job of sign technician, he does not have other training or work experience. His testimony showed him to be a credible individual who intended to work to age 65.

Mr. Brown has significant previous industrial injuries to his low back. The Department recognized that fact with a Category 4 award of a permanent partial disability. His industrial injury in this appeal occurred in a job which Mr. Brown expected to be lighter duty than his previous work, thus allowing him to return to work following a previous industrial injury.

At issue is essentially whether an individual possessing his physical conditions, training, work experience, and personal attributes cannot obtain or perform any employment on a

reasonably, continuous basis for the remainder of his lifetime. In resolving these questions, it is incumbent to assess Mr. Brown's physical limitations, personal background, and employment opportunities. The PCE and medical testimony agreed Mr. Brown has physical restrictions relating to lifting, bending, standing, sitting, and walking. The vocational evidence showed Mr. Brown had limited transferable skills, and work experience limited to vehicle repair.

In this case, it is uncontested that the claimant cannot return to his job of injury, and that his condition is fixed and stable. Further treatment is not at issue. Additionally, Mr. Brown's capabilities and related limitations and restrictions as set forth in the PCE are also uncontested. There was no evidence that Mr. Brown could perform the job of lube servicer as described in the job analysis prepared by Ms. Larson. At issue is whether the lube servicer job analysis prepared by Ms. Anderson, the Department vocational counselor, accurately reflects the job duties and requirements, or whether the lube servicer job analysis prepared by Ms. Larson accurately reflects the job duties and requirements.

Ms. Larson was more persuasive in her testimony with regards to the lube servicer job requirements of working overhead and bending. I conclude that the lube servicer job analysis prepared by Ms. Larson more accurately reflects the job duties and requirements of the position. Further, I note Ms. Anderson conceded in her testimony that the lube servicer job analysis she prepared reflected greater walking and standing requirements than Mr. Brown was capable of performing according to the PCE.

With regard to medical testimony, Dr. Lang, as Mr. Brown's attending physician pertaining to his back conditions, had an advantageous perspective of the course of his treatment and medical history. Dr. Lang's explanation that the impact of the lumbar sprain/strain industrial injury on Mr. Brown's pre-existing back condition was cumulative is persuasive and appears consistent with the development of his conditions, and the related restrictions on his physical capabilities.

Further, Dr. Lang's conclusions are more persuasive than those of Dr. Vincent. Dr. Lang provided medical treatment for Mr. Brown over a prolonged period of observation. Dr. Vincent conducted a single examination several months before the Department's closing order. Dr. Vincent concluded Mr. Brown was able to return to the job of injury, a conclusion not even shared by the Department's vocational witness. The opinion of Dr. Vincent was restricted only to the residuals of the industrial injury, and this limited analysis did not incorporate the consequences of any pre-existing physical symptoms in conjunction with the industrial injury. Dr. Lang's opinion regarding employability considered all relevant factors and, therefore, is more persuasive. Dr. Lang

was unequivocal in his conclusion that Mr. Brown could not perform the job of lube servicer because the requirements for overhead work and bending exceeded Mr. Brown's physical capabilities.

While Mr. Brown has been released to work in light to medium light duty work, there were no jobs within his transferable skills identified. Further, Ms. Larson testified persuasively that Mr. Brown would need vocational assistance to become employable in any other occupation.

Mr. Brown has medically imposed physical work restrictions, and does not possess skills to work at another job within his physical restrictions in the labor market. Considering the vocational and medical evidence in this case, I conclude Mr. Brown has demonstrated that he is not able to perform the lube servicer job, the only job identified by the Department. In addition, I conclude Mr. Brown has demonstrated that he is not able obtain and perform gainful employment on a regular and continuous basis.

Having assessed the pre-existing medical conditions Mr. Brown experienced, the residuals of Mr. Brown's industrial injury, his age, education, training, transferable skills, work history, and occupational retraining prognosis, I conclude, based on the preponderance of the evidence, that Mr. Brown was unable to work full time on a regular and continuous basis between April 10, 2009, and July 23, 2009, and for the foreseeable future.

The Department's decisions in its April 10, 2009 letter and the Department order of July 24, 2009, are incorrect and are reversed. The matters are remanded to the Department with directions to pay time-loss compensation benefits for the period of April 10, 2009, through July 23, 2009, inclusive; determine Mr. Brown is a permanently and totally disabled worker as of July 24, 2009; provide him with benefits attendant to that status; and take such further action as is appropriate given the law and the facts.

FINDINGS OF FACT

1. Randy L. Brown filed an Application for Benefits with the Department of Labor and Industries on November 14, 2008, alleging he sustained an industrial injury on November 6, 2008, during the course of his employment with Mason County Auditor. The Department allowed the claim and paid benefits.

Docket No. 09 14595

The Department issued a decision contained in a letter on April 10, 2009, determining Mr. Brown was able to return to work in the job of lube technician, could no longer be offered a vocational assessment, and that time loss compensation benefits had ended. The claimant filed a Notice of Appeal from this decision on April 30, 2009, with the Board

of Industrial Insurance Appeals. The Board issued an order on May 6, 2009, granting the appeal under Docket No. 09 14595.

Docket No. 09 17896

The Department issued an order on May 15, 2009, closing the claim with a permanent partial disability award equal to Category 4 permanent dorso-lumbar and/or lumbosacral impairments, and took into consideration the Category 4 pre-existing permanent dorso-lumbar and/or lumbosacral impairments. The claimant's provider, Dr. Robert Gilmer Ross Lang, protested this order on May 19, 2009, and the Department affirmed the order on July 24, 2009. The claimant filed a Notice of Appeal from this order on July 27, 2009, with the Board of Industrial Insurance Appeals. The Board issued an order on August 20, 2009, granting the appeal under Docket No. 09 17896.

Hearings were held, and on February 19, 2010, a Proposed Decision and Order in this appeal was issued. On April 5, 2010, the claimant filed a Petition for Review with the Board. On May 7, 2010, the Board issued an Order Vacating the Proposed Decision and Order and Remanding the Appeal for Further Proceedings

2. On November 6, 2008, while in the course of his employment with Mason County Auditor, Mr. Brown slipped while carrying signs, twisted his body, and injured his low back.

3. As a result of the November 6, 2008 industrial injury, Mr. Brown sustained a lumbar sprain/strain.

4. At the time of the November 6, 2008 industrial injury, Mr. Brown had pre-existing back and neck conditions, and a history of four low back surgeries including a fusion at L4-L5 and L5-S1 resulting in rigid fixation at that area, a pre-existing neck fusion surgery, and pre-existing bilateral carpal tunnel syndrome surgery. Mr. Brown has difficulty bending and working overhead.

5. As of July 24, 2009, Mr. Brown's lumbar strain proximately caused by the November 6, 2008 industrial injury, was fixed and stable, with no curative medical treatment available.

6. As of July 24, 2009, Mr. Brown's low back impairment proximately caused by the November 6, 2008 industrial injury, was best described as a permanent low back impairment with clinical findings consistent with and most adequately expressed by Category 4 of WAC 296-20-280, Categories for Permanent Dorso-lumbar and/or Lumbosacral Impairment, taking into consideration the Category 4 pre-existing permanent dorso-lumbar and/or lumbosacral impairments.

7. Mr. Brown is a 58 year-old high school graduate and military veteran, with skills as a vehicle mechanic and as a sign technician. His job of injury was sign technician. Mr. Brown was unable to return to work as a sign technician. Mr. Brown was unable to perform the job duties and requirements of a lube servicer.

8. During the period of April 10, 2009 through July 23, 2009, the physical conditions, proximately caused by Mr. Brown's industrial injury of November 6, 2008, were a proximate cause of his inability to perform work activities on a reasonably continuous basis.

9. In view of his age, education, training, work experience, transferable skills, pre-existing back and neck conditions, and the physical residuals proximately caused by his industrial injury of November 6, 2008, Mr. Brown was temporarily precluded from of obtaining and/or performing any form of gainful employment on a reasonably continuous basis in the competitive labor market during the period April 10, 2009, through July 23, 2009, inclusive.

10. In view of his age, education, training, work experience, transferable skills, pre-existing back and neck conditions, and the physical residuals proximately caused by his industrial injury of November 6, 2008, Mr. Brown was permanently precluded from of obtaining and/or performing any form of gainful occupation on a reasonably continuous basis in the competitive labor market as of July 24, 2009.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.

2. On November 6, 2008, Mr. Brown sustained an industrial injury as contemplated by RCW 51.08.100 during the course of his employment with Mason County Auditor, consisting of a lumbar strain.

3. Between April 10, 2009, and July 23, 2009, inclusive, Mr. Brown was a temporarily totally disabled worker within the meaning of the Industrial Insurance Act and RCW 51.32.090.

4. As of July 24, 2009, Mr. Brown was a permanently totally disabled worker within the meaning of the Industrial Insurance Act and RCW 51.08.160.

5. The decision of the Department of Labor and Industries dated April 10, 2009, is incorrect and is reversed. The order of the Department of Labor and Industries dated July 24, 2009, is incorrect and is reversed. This claim is remanded to the Department with direction to pay time-loss compensation benefits from April 10, 2009, through July 23, 2009, inclusive, determine Mr. Brown is a permanently totally disabled worker effective July 24, 2009, and provide all benefits attendant to that status.

DATED: DEC 08 2010.

Jamie M. Moore
Industrial Appeals Judge
Board of Industrial Insurance Appeals