NO. 101071-1

SUPREME COURT OF THE STATE OF WASHINGTON

CHRISTOPHER R BLANCHARD,

PETITIONER,

V.

THE WASHINGTON STATE EMPLOYMENT SECURITY DEPARTMENT,

RESPONDENT.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

This case involves the straightforward application of the plain language of RCW 50.20.085, which prohibits an individual from receiving unemployment benefits for "any day or days for which he or she is receiving, has received, or will receive compensation under RCW 51.32.060," the statute that authorizes permanent total disability compensation.

Mr. Blanchard does not argue that this statutory language is not plain. Instead, he makes the misguided argument that he receives industrial insurance benefits under the statute that *defines* permanent total disability, RCW 51.08.160, rather than the statute that *authorizes* compensation for someone who has suffered a permanent total disability in the workplace, RCW 51.32.060.

The Court of Appeals properly rejected Mr. Blanchard's faulty premise and concluded that he receives permanent total disability benefits under the only statute that authorizes their payment, RCW 51.32.060. *Blanchard v. Emp. Sec. Dep't*, No.

82989-1-I, 2022 WL 1210526 (Wash. Ct. App. April 25, 2022) (unpublished). This is true even if the definitional statute creates two categories by which an injury can meet the definition of "permanent total disability." There is still only one pension authorized for both definitional categories, and that is permanent total disability compensation authorized under RCW 51.32.060. Mr. Blanchard was, therefore, precluded from receiving unemployment compensation under RCW 50.20.085.

The Court of Appeals decision does not conflict with any other decision, and Mr. Blanchard's petition does not raise an issue of substantial public interest warranting review. This Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUE

Under the Employment Security Act, Title 50 RCW, "An individual is disqualified from [unemployment] benefits with respect to any day or days for which he or she is receiving, has received, or will receive compensation under RCW 51.32.060 or 51.32.090." RCW 50.20.085. Did the Commissioner correctly

conclude that Mr. Blanchard is disqualified from receiving unemployment benefits because he receives permanent total disability benefits under RCW 51.32.060—the only statute that provides for permanent total disability benefits?

III. COUNTERSTATEMENT OF THE CASE

In 1997, while working at Chihuly Studios, Mr. Blanchard suffered an accident that left him without the use of his legs, hands, and fingers. CP 40, 110 (Findings of Fact (FF) 5-6). The Department of Labor and Industries determined that Mr. Blanchard had suffered a permanent total disability from a workplace accident. CP 40, 110 (FF 7). Since then, the Department of Labor and Industries has paid Mr. Blanchard monthly permanent total disability benefits. CP 41, 110 (FF 8).

Despite his injury, Mr. Blanchard has the ability to turn his head and use his arms. CP 40, 110 (FF 9). This has allowed him to continue to work for Chihuly Studios as a designer for approximately 30 hours per week since 1998. CP 40, 42, 49, 110 (FF 9-11).

In 2020, Chihuly Studios reduced its employees' hours to approximately 20 hours per week because of the pandemic. CP 44, 49, 110 (FF 12). Mr. Blanchard applied for unemployment benefits under the shared work program, which allows a person to claim partial unemployment benefits to compensate for reduced wages. CP 44, 49, 110 (FF 13). In his weekly claim, Mr. Blanchard reported to the Employment Security Department that he receives industrial insurance benefits. CP 45. Because RCW 50.20.085 prohibits a person from receiving unemployment benefits if they also receive permanent total disability benefits under RCW 51.32.060, the Employment Security Department denied Mr. Blanchard's claim. CP 65-68.

Mr. Blanchard appealed the Employment Security Department's determination. He argued that he receives permanent total disability benefits under RCW 51.08.160 rather than RCW 51.32.060, and thus RCW 50.20.085 does not preclude him from receiving unemployment benefits. CP 37-38,

56-61. After an administrative hearing, an administrative law judge (ALJ) affirmed the Employment Security Department's decision. CP 109-115. The ALJ concluded that Mr. Blanchard receives permanent total disability compensation under RCW 51.32.060, and RCW 50.20.085 thus disqualified him from receiving unemployment benefits. CP 111 (Conclusions of Law (CL) 5, 6).

Mr. Blanchard requested review of the ALJ's decision by the Employment Security Department's Commissioner and made the same argument. CP 116-126. The Commissioner adopted the ALJ's findings of fact and conclusions of law and added:

> [Mr. Blanchard] is receiving his pension based upon the criteria set forth in RCW 51.32.060 and accordingly he is not entitled to unemployment benefits. The fact that Labor and Industries permits him to work a certain number of hours because he is on statutory pension has no effect on the very strict language in the statute that disqualifies a claimant from receiving unemployment benefits if he is receiving workers' compensation benefits. The statutes are mutually exclusive and relate to two very different insurance programs.

CP 129.[1] Mr. Blanchard appealed to the King County Superior Court, which affirmed the Commissioner's decision. CP 214-222.

Mr. Blanchard then appealed to the Court of Appeals. *Blanchard v. Emp. Sec. Dep't*, No. 82989-1-I, 2022 WL 1210526 (Wash. Ct. App. April 25, 2022) (unpublished). The Court of Appeals rejected Mr. Blanchard's argument that he receives permanent total disability benefits under RCW 51.08.160, concluding that "RCW 51.08.160 merely defines 'permanent total disability.'" *Blanchard*, 2022 WL 1210526, at *1. The permanent total disability benefits that Mr. Blanchard receives are "paid under RCW 51.32.060 based upon and consistent with the definition of 'permanent total disability' in RCW 51.08.160." *Blanchard*, 2022 WL 1210526, at *2. Because Mr. Blanchard receives permanent total disability benefits under

[1] The Commissioner's Review Office declined to adopt two conclusions of law from the ALJ related to Mr. Blanchard's payment of conditional benefits. CP 129. This issue was not subject to any further appeal.

RCW 51.32.060, the Court of Appeals held that RCW 50.20.085 disqualifies him from receiving unemployment benefits. *Blanchard*, 2022 WL 1210526, at *1.

The Court of Appeals denied Mr. Blanchard's motion to reconsider its ruling.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Court of Appeals correctly ruled that Mr. Blanchard receives permanent total disability benefits "under RCW 51.32.060 based upon and consistent with the definition of 'permanent total disability'" and that, as a result, RCW 50.20.085 prohibits him from receiving unemployment benefits. *Blanchard*, 2022 WL 1210526, at *1, 2.

In his petition, Mr. Blanchard reiterates his "faulty premise" that "there are two distinct types of permanent total disability pensions for the purposes of the unemployment compensation statute." *Blanchard*, 2022 WL 1210526, at *2. While there may be two general ways to meet the definition of

"permanent total disability" under RCW 51.08.160, as the court recognized, that statute "merely defines 'permanent total disability.'" *Blanchard*, 2022 WL 1210526, at *1. Workers whose injuries meet that definition are paid benefits exclusively under RCW 51.32.060—the only statute that authorizes them. The plain language of RCW 50.20.085 thus expressly disqualifies Mr. Blanchard from receiving unemployment benefits.

Not only is Mr. Blanchard's central argument that the definition of permanent total disability creates two types of benefits incorrect, but he also fails to establish why this Court should grant review of his petition. The only appellate case that Mr. Blanchard alleges conflicts with the court's decision, *Fochtman v. Department of Labor and Industries*, 7 Wn. App. 286, 288, 499 P.2d 255 (1972), fully comports with the court's opinion. It does not, as Mr. Blanchard suggests, establish that the permanent total disability definition creates two types of pensions. Pet. for Review 15. And since the Court of Appeals

here correctly applied the plain language of the statutes at issue, Mr. Blanchard's appeal does not involve an issue of substantial public interest for this Court to resolve. Further review in this case is unwarranted.

A. RCW 51.08.160 Merely Defines "Permanent Total Disability;" It Does Not Authorize the Payment of Benefits

The Court of Appeals properly recognized that RCW 51.08.160 simply defines permanent total disability. *Blanchard*, 2022 WL 1210526, at *1. The definition does not bestow a benefit or address compensation in any way. Mr. Blanchard continues to make the flawed argument that the Industrial Insurance Act "defines two types of pensions," one under RCW 51.08.160 and another under RCW 51.32.060. Pet. for Review 11. The Court of Appeals properly rejected this misreading.

Chapter 51.08 RCW provides the definition of "words used in this title." RCW 51.08.010. And RCW 51.08.160 defines "permanent total disability." Mr. Blanchard is correct that the

definition does identify two general ways a worker may be adjudged to have suffered a permanent total disability. First, a worker may have suffered one of the "per se" injuries specified in the statute, such as the "loss of both legs, or arms, or one leg and one arm, total loss of eyesight, [or] paralysis." RCW 51.08.160; *Leeper v. Dep't of Lab. and Indus.*, 123 Wn.2d 803, 811, 872 P.2d 507 (1994). Alternatively, a worker's injury may meet a "general standard" of permanent total disability, which is any "other condition permanently incapacitating the worker from performing any work at any gainful occupation." *Id.*; *see also Fochtman*, 7 Wn. App. at 288.

But Mr. Blanchard mistakes the two general ways an individual can meet the definition of permanent total disability with the existence of two separate pensions. While there may be two general categories of permanent total disability under the definitional statute, there is only one pension authorized for both definitional categories, and that pension is authorized only under RCW 51.32.060. Whether a worker's injury meets the definition

of "permanent total disability" as a per se injury or as an injury under the general standard, the worker then becomes entitled to compensation under RCW 51.32.060. In other words, just because there are two general types of permanent total disability, that does not mean the definitional statute creates two types of pensions—so-called "discretionary" and "statutory" pensioners, as Mr. Blanchard defines them. This is the "faulty premise" the Court of Appeals correctly rejected.

In Re Jerry Belton, BIIA Dec. 85 2107 (1987), does not support Mr. Blanchard's argument that there are two types of pensions under RCW 51.08.160. Pet. for Review 12-13. As the court explained, the key issue in *Belton* was whether the worker's "ability to obtain 'gainful employment' impacted his 'total disability' status for purposes of receiving his disability pension." *Blanchard*, 2022 WL 1210526, at *3. The Board of Industrial Insurance Appeals held that, like Mr. Blanchard, "Belton was entitled to receive disability compensation regardless of his ability to retain gainful employment . . . ." *Id.*

The decision "does not address"—let alone establish—two types of pensions under RCW 51.08.160. *Id*.

The Court of Appeals properly understood that anyone meeting the definition of "permanent total disability" under RCW 51.08.160—regardless of how they meet the definition—then receives benefits under the compensation statute, RCW 51.32.060. *Blanchard*, 2022 WL 1210526, at *2.

B. Only RCW 51.32.060 Authorizes Permanent Total Disability Benefits, and It Creates Only One Pension

Industrial insurance benefits are authorized exclusively in chapter 51.32 RCW. RCW 51.32.010 explains that "[e]ach worker injured in the course of his or her employment . . . *shall receive compensation in accordance with this chapter* . . . ." (Emphasis added).

In authorizing permanent total disability benefits specifically, RCW 51.32.060(1) provides that "[w]hen the supervisor of industrial insurance shall determine that permanent total disability results from the injury, the worker shall receive

monthly during the period of such disability" amounts specified by statute. Washington courts have consistently identified RCW 51.32.060 as the statute that authorizes the payment of permanent total disability benefits. *See, e.g.*, *Clauson v. Dep't of Lab. and Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996) ("RCW 51.32.060 provides that a worker who is permanently and totally disabled shall receive monthly payments during the period of disability." (Emphasis omitted)); *Weyerhaeuser Co. v. Farr*, 70 Wn. App. 759, 765, 855 P.2d 711 (1993). The Court of Appeals here also recognized this fact. *Blanchard*, 2022 WL 1210526, at *2.

Mr. Blanchard continues to argue that the word "determine" in RCW 51.32.060(1) limits the benefits in the statute only to those whom the supervisor of industrial insurance "determines" suffered a permanent total disability under the general standard. Pet. for Review 10-12, 17-19. But, as the Court noted, the "shall determine" language simply means "that any permanent total disability pension requires the supervisor of

industrial insurance to determine 'that the [claimant's] permanent total disability results from the injury.'" *Blanchard*, 2022 WL 1210526, at *2, n.6. That is, the Department of Labor and Industries first must "determine" whether the worker has suffered a permanent total disability as defined by RCW 51.08.160, regardless of whether the injury is a per se injury or an injury under the general standard, before benefits are authorized. Nothing in the text or RCW 51.32.060(1) or elsewhere limits the determination to the general standard.

Since the plain language of RCW 51.32.060 is clear, this Court should decline to consider Mr. Blanchard's discussion of the changes to the statute in 1957, which he raises for the first time in his Petition. Pet. for Review 21-22. And in any event, the argument makes no sense. Mr. Blanchard argues that when the Legislature added the phrase "when the supervisor of industrial insurance shall determine" in 1957, it intended to limit benefits under RCW 51.32.060 to only those who have suffered a permanent total disability under the general standard. *Id.* But the

added language simply identifies *who* makes the determination that a person's injury or injuries meet the definition of "permanent total disability"—the supervisor of industrial insurance. It in no way limits benefits under RCW 51.32.060 to only injuries meeting the general standard under RCW 51.08.160.

Further, a section from a Department of Labor and Industrials manual and a section from a separate guideline for self-insured employers does not establish Mr. Blanchard's theory that there are two separate permanent total disability pensions under two separate statutes. *See* Pet. for Review 15-16. The manual and the guideline properly recognize that there are distinct types of permanent total disability under the definitional statute, but do not purport to say that any concomitant benefits are not authorized by RCW 51.32.060. Nor could they, because that would conflict with the plain language of RCW 51.32.060. Rather, these materials simplify and repackage statutes related to applying for, qualifying for, and receiving industrial insurance

benefits, as well as the limitations on these benefits. These explanatory materials do not establish that RCW 51.08.160 *itself* or *alone* compensates workers who have suffered a permanent total disability. And they do not change the analysis that only RCW 51.32.060 authorizes permanent total disability compensation.

RCW 51.32.060 simply means that when an injury results in a permanent total disability as defined by RCW 51.08.160—under the general standard *or* the per se standard—the injured worker is entitled to benefits. *Blanchard*, 2022 WL 1210526, at *2, n.6. The statute is unambiguous and requires no further construction.

The Court of Appeals properly rejected Blanchard's invitation to read anything more into the "shall determine" language. This Court should too and deny further review.

C. The Court's Decision is Consistent With *Fochtman v. Department of Labor and Industries*

Contrary to Mr. Blanchard's assertion, the Court of Appeal's analysis is consistent with *Fochtman v. Department of Labor and Industries*. Pet. for Review 15; RAP 13.4(b)(2).

As in this case, the *Fochtman* court recognized that RCW 51.08.160 provided two general ways to meet the permanent total disability definition—either through a per se injury or through an injury under the general standard. *Fochtman*, 7 Wn. App. at 287. *Fochtman* then ruled that a qualified vocational consultant could testify as to whether an injured employee met the general standard—an inquiry not at issue in this case. *Id*. *Fochtman* in no way creates two separate pensions under two separate statutes, and it does not conflict with the Court of Appeal's decision.

Further, Mr. Blanchard is wrong that *Fochtman* concluded that the "supervisor of industrial insurance shall determine" language means there are two distinct classes of pensioners. Pet. for Rev. 15, 18. Rather, *Fochtman* simply recognized the two separate ways an injury can meet the permanent total

disability definition and then analyzed the allowable evidence to meet the general standard. *Fochtman*, 7 Wn. App. at 288. It is a mischaracterization of the case to argue that *Fochtman* stands for the proposition that under RCW 51.32.060, the supervisor of industrial insurance makes "determinations" only on injuries under the general standard.

Since *Fochtman* comports with the court's decision and is the only case that Mr. Blanchard cites to as in conflict with the court's decision, this Court should decline to accept review under RAP 13.4(b)(2).

D. Mr. Blanchard's Policy Arguments Cannot Override the Statutes' Plain Language

Because the statutory language is clear, and the Court of Appeals properly applied it, there are no issues of substantial public interest warranting review. RAP 13.4(b)(4). Mr. Blanchard's policy arguments about collecting unemployment taxes from employers whose workers may not qualify for benefits and about his ability to work do not alter the statutory

analysis and cannot overcome the plain language of Employment Security and Industrial Insurance Acts.

1. The plain language of RCW 50.20.085 precludes Mr. Blanchard's receipt of unemployment benefits without regard to his employer's payment of unemployment taxes

Because the court properly held that Mr. Blanchard receives permanent total disability benefits under RCW 51.32.060 and not RCW 51.08.160, it necessarily follows that the court also correctly concluded that Mr. Blanchard was disqualified from unemployment compensation under RCW 50.20.085. *Blanchard*, 2022 WL 1210526, at *1. That statute plainly provides: "An individual is disqualified from [unemployment] benefits with respect to any day or days for which he or she is receiving, has received, or will receive compensation under RCW 51.32.060[.]" RCW 50.20.085. Because Mr. Blanchard receives permanent total disability benefits under RCW 51.32.060, "he is disqualified from

receiving unemployment benefits." *Blanchard*, 2022 WL 1210526, at *1.

In an attempt to overcome this plain language, Mr. Blanchard objects to allowing the Employment Security Department to collect unemployment taxes from an employer for an employee who cannot receive unemployment benefits. Pet. for Review 29. Given the plain language of RCW 50.20.085, that policy objection obviously must be addressed to the Legislature. But even so, just because an *employer* pays unemployment insurance taxes into the trust fund, *see* RCW 50.24.010 (requiring employers to make contributions to the unemployment compensation fund based on the amount of wages paid to individuals in employment of the employer), it does not necessarily mean that all of its employees will be eligible for unemployment benefits. All applicants must meet various eligibility criteria before qualifying for unemployment benefits. *E.g.*, RCW 50.04.030 (requiring individuals to, among other things, have worked at least 680 hours in the year preceding their

application); RCW 50.20.010 (setting forth multiple eligibility conditions); RCW 50.20.050 (person must not have quit without good cause); RCW 50.20.066 (person must not have been discharged for misconduct). If an unemployed individual does not ultimately qualify for benefits, the employer does not receive a tax refund. Here, the legislature expressly excluded those receiving permanent total disability benefits from receiving unemployment insurance. RCW 50.20.085. It has not made a corresponding exclusion for employers from paying unemployment taxes on their wages.

Moreover, a liberal construction of the Employment Security Act and Industrial Insurance Act cannot change the court's decision. Pet. for Review, 26-28. "The liberal construction requirement cannot be used to support a 'strained or unrealistic interpretation' of statutory language." *Sherry v. Emp. Sec. Dep't*, 19 Wn. App. 2d 952, 963, 498 P.3d 580, 585 (2021) (quoting *Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n,* 133 Wn.2d 229, 243, 943 P.2d 1358 (1997).

Mr. Blanchard asks the Court to misconstrue unambiguous statutes in a manner that has no basis in law. His theory that he receives disability compensation under a definitional statute—so that he will not be precluded from receiving unemployment compensation under RCW 50.20.085—is a strained and unrealistic interpretation of the statutory language. In the face of plain statutory language, Mr. Blanchard's policy arguments do not create any issues of substantial public interest warranting review.

2. One's ability to work does not override RCW 50.20.085's plain prohibition on the simultaneous receipt of unemployment and permanent total disability benefits

Separately, Mr. Blanchard's ability to work is not relevant to nor proof of the existence of a pension under RCW 51.08.160 rather than RCW 51.32.060, and it does mean that RCW 50.20.085 does not apply to him. The ability to work does not raise an issue of substantial public interest warranting review. Pet. for Review 13-14; RAP 13.4(b)(4).

Of the two general ways to meet the permanent total disability definition—either the per se standard or the general standard—the ability to work is only relevant to the general standard. Under the general standard a worker has to show that their injury prevents them "from performing any work at any gainful occupation." RCW 51.08.160. *See Leeper*, 123 Wn.2d. at 811. But here, Mr. Blanchard's injury meets the per se standard because he suffered a catastrophic injury that that left him without the use of his legs, hands, and fingers. CP 40, 110 (FF 5-6). That is how he meets the definition of permanent total disability under RCW 51.08.160, which in turn is why he receives benefits under RCW 51.32.060.

Moreover, RCW 50.20.085 does not premise the disqualification from unemployment benefits on an individual's inability to work. Rather, employees are categorically excluded from receiving unemployment benefits if they receive benefits under RCW 51.32.060 or RCW 51.32.090, regardless of their ability to work.

Mr. Blanchard's petition for this Court to permit the simultaneous receipt of permanent total disability benefits and unemployment insurance benefits when the Legislature chose not to allow for it does not create an issue of substantial public interest and does not provide a reason for the Court's review. The Court of Appeals followed the plain language of the law and its opinion is consistent with case law, so any substantial interest in a permanently totally disabled worker receiving unemployment benefits can only be affected through the legislative process, not through review of the Court of Appeal's decision. There is no basis for review under RAP 13.4(b)(4).

V. CONCLUSION

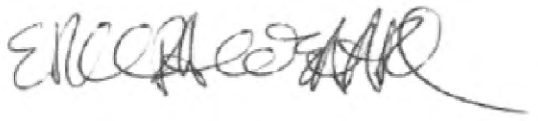
The Court of Appeals properly ruled that Mr. Blanchard receives permanent total disability benefits under RCW 51.32.060, and RCW 50.20.085 thus excluded Mr. Blanchard from simultaneously receiving unemployment benefits. There is no basis for granting Mr. Blanchard's petition.

CERTIFICATION

I certify that this document contains 3,737 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 14TH day of September, 2022.

ROBERT W. FERGUSON
Attorney General



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I, Eric Palosaari, certify that I caused to be served a copy of **Answer to Petition for Review** on all parties on their counsel of record on the date below as follows:

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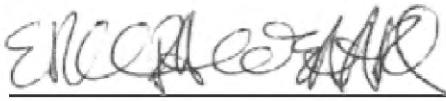
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this _14TH_ day of September 2022, in Seattle, Washington.



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