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NO. 69759-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BOEING COMPANY,

Respondent,

v.

PATRICIA DOSS,

Respondent,

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

The issue presented to this Court is who and which fund is responsible for paying the costs of ongoing medical treatment for a worker who is permanently totally disabled due to the combined effects of an industrial injury sustained in the course of employment with a self-insured employer and a previous disability. Resolution of this appeal turns on the meaning of several interrelated provisions of the Industrial Insurance Act, Title 51 RCW. The Industrial Insurance Act creates a comprehensive scheme of benefits funded by employees and employers to provide "sure and certain relief for workers, injured in their work[.]" RCW 51.04.010. The Department of Labor and Industries (Department) is responsible for administering various trust funds to ensure such statutory benefits are available to injured workers. The various funds created under the Industrial Insurance Act are unique and devoted to special purposes. They cannot be interchanged or substituted for one another absent legislative direction to do so.

In this case, Patricia Doss is permanently totally disabled as a result of the combined effects of a preexisting condition and a chemical exposure she sustained while employed by The Boeing Company (Boeing). Boeing self-insures its employees' industrial insurance benefits. As a permanently totally disabled worker, Doss receives a monthly wage

replacement benefit referred to as a "pension." Because of Doss' preexisting condition, a portion of Doss' pension is paid by Boeing and the remainder is paid from a fund administered by the Department known as the "second injury fund." In addition to the pension, Doss continues to receive medical treatment. The Department correctly concluded Boeing was responsible for paying for Doss' post-pension medical treatment costs because the second injury fund cannot be used to pay for such costs. The Board of Industrial Insurance Appeals (Board) affirmed the Department's determination.

The superior court erred in reversing the Board's decision and ordering the Department to pay the costs of Doss' ongoing post-pension medical treatment out of the second injury fund. The second injury fund is neither intended to pay such benefits nor is it funded to do so. The Department asks this Court to reverse the superior court's decision and affirm the Board's order deciding that Boeing, as a self-insured employer, is responsible for the costs of post-pension medical treatment for its employee, Doss.

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II. ASSIGNMENTS OF ERROR

A. Assignment of Error No. 1:

The trial court erred in finding Boeing was only responsible for costs solely related to Doss' allowed industrial condition and the Department was responsible for the remaining costs chargeable to the second injury fund. (Finding of Fact No. 5.) The costs of Doss' post-pension medical treatment, necessitated by the combination of her preexisting asthma and the permanent aggravation of her asthma sustained as a result of chemical exposure at Boeing, are Boeing's responsibility and may not be charged to the second injury fund.

B. Assignment of Error No. 2:

The trial court erred in concluding Doss' treatment costs are payable from the second injury fund and, thereby, erred in reversing the December 15, 2011 Board order, as the Board properly affirmed a July 27, 2010 Department letter indicating Boeing was responsible for the costs of Doss' post-pension medical treatment and such costs should not be paid out of the second injury fund. (Conclusions of Law Nos. 4, 5, 6.)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **Is a self-insured employer responsible for the costs of ongoing medical treatment for one of its employees once the employee is determined to be permanently totally disabled from the combined effects of an injury he or**

she sustained in the course of employment with the self-insured employer and a previous disability?

2. **Should the Court assess the costs of post-pension medical treatment for an employee of a self-insured employer against the second injury fund when the second injury fund is neither intended to nor funded to cover such costs?**

3. **Did the superior court err in failing to give deference to the Board's interpretation of a statute it administers, instead relying on a superior court determination in a different case when such decision is not authoritative and has no precedential effect?**

IV. STATEMENT OF THE CASE

In March 2000, Patricia Doss filed a workers' compensation claim for chemical exposure to her lungs while employed by Boeing, a self-insured employer. Board Record (BR) at 80. Before the exposure at Boeing, Doss suffered from symptomatic asthma requiring treatment and had some permanent work restrictions as a result. BR at 66-67. The chemical exposure Doss sustained while employed by Boeing permanently aggravated her preexisting asthma. BR at 67, 82-83.

The Department determined, as of May 14, 2008, Doss was permanently totally disabled due to the combined effects of the permanent aggravation of her preexisting asthma and a right knee injury. BR at 73, 83. The Department found Boeing was entitled to second injury fund relief in accordance with RCW 51.16.120, meaning Boeing would not be

responsible for the full costs of Doss' pension because her permanent total disability was caused by the combined effects of her chemical exposure at Boeing and a preexisting disability. BR at 77. Instead, Boeing was required to pay the permanent partial disability attributable to workplace injuries that occurred at Boeing in the amount of $22,237.07. BR at 77. The Department ordered Boeing to pay this amount, stating "[t]he balance of the pension reserve required to pay this pension shall be charged against the Second Injury account." BR at 77.

Although Doss was permanently totally disabled, the Department authorized continued medical treatment for her asthma, specifically asthma medications and "up to one medical office call monthly for the purpose of medical monitoring of medications." BR at 74. The need for this ongoing treatment is a result of Doss' preexisting asthma and the permanent aggravation of her asthma condition sustained as a result of her exposure at Boeing. BR at 67, ¶ 4. On July 27, 2010, the Department issued a letter informing Boeing that it, as a self-insured employer, was responsible for paying the costs of Doss' ongoing medical treatment. BR at 89. Boeing appealed this letter to the Board. BR at 98.

The sole issue on appeal was whether Doss' post-pension medical treatment should be paid by Boeing or out of the second injury fund administered by the Department. BR at 67. A hearings judge issued a

proposed decision affirming the Department's letter. BR at 23-28. Boeing filed a petition for review, which the Board granted. BR at 7-18. On December 15, 2011, the Board issued a decision affirming the Department's determination, concluding, "Pursuant to RCW 51.44.040, RCW 51.16.120, and *In re Crella Boudon*, BIIA Dec., 98 17459 & 99 22359 (2000), Ms. Patricia A. Doss' post-pension treatment benefits are not payable from the Second Injury Fund and are to be properly borne by the self-insured employer, The Boeing Company." BR at 4.

Boeing appealed to superior court. The superior court reversed the Board's determination. CP at 57-61. The superior court concluded, "Ms. Doss' post pension treatment benefits are properly payable from the Second Injury Fund, and are not the responsibility of Boeing." CP at 60. Specifically, the court noted, "This Court relied in part on [another superior court decision] *DLI v. Boudon* 00-2-05612-5KNT, using this decision as precedent, as the court was acting in its appellate capacity." CP at 60. The Department timely appealed to this Court. CP at 62.

V. STANDARD OF REVIEW

In a workers' compensation matter, a superior court reviews the Board's decision de novo based on the evidence presented to the Board. RCW 51.52.115; *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998). The Court of Appeals reviews the superior court's

determination using the ordinary civil standards of review. RCW 51.52.140; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009). Questions of law, including the interpretation of a statute, are reviewed de novo. *Christensen v. Ellsworth*, 162 Wn.2d 365, 370, 173 P.3d 228 (2007). No factual questions are raised in this appeal as the parties stipulated to the evidence on review. When a case is tried on stipulated facts, only questions of law remain and appellate review is de novo. *Tunstall v. Bergeson*, 141 Wn.2d 201, 209-210, 5 P.3d 691 (2000).

VI. ARGUMENT

The Industrial Insurance Act is a self-contained system providing specific procedures and remedies whose provisions work together for the fair, orderly, and financially sound administration of the workers' compensation system. With a limited exception, self-insured employers are responsible for paying their employees' workers' compensation claims. In this case, a self-insured employer seeks to evade its responsibility for paying the costs of its employee's post-pension medical treatment by having the Department pay such costs out of a trust fund administered by the Department. However, Boeing's arguments in support of its legal position are incorrect.

To determine who pays for post-pension medical treatment in this case, the Court must consider the interplay of several different statutes

within the Industrial Insurance Act. The terms of a statute must be read in light of other statutes within the same legislative scheme "'to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.'" *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (quoting *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974)); *see Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The plain meaning of the statutes in question, read in light of the industrial insurance scheme, leads to one conclusion: the Board and Department properly determined Boeing was responsible for the costs of Doss' post-pension medical treatment. The superior court erred in ordering the Department to pay the costs of Doss' post-pension medical treatment out of the second injury fund, as this fund is neither intended for nor funded for payment of such benefits.

This brief begins by providing background information regarding the various funds utilized in administering industrial insurance disability benefits and medical benefits. Next, an examination of the plain language of RCW 51.44.040(1), which creates the second injury fund, dictates that the second injury fund cannot be used to pay the costs of Doss' post-pension treatment because this statute specifically limits what can be charged against the fund and medical costs are not included. Additionally,

second injury fund premium assessments paid by self-insured employers do not include estimates of medical costs and to require the fund to cover such costs shifts a self-insured employer's responsibility to state fund employers. As the second injury fund cannot be used to pay Doss' post-pension medical costs, Boeing must be responsible for such costs because the use of any other trust fund would violate the trust nature of such funds. Finally, the superior court erred by failing to defer to the Board's expertise in this area as set forth in a significant Board decision, instead inappropriately relying on a superior court determination in another case.

A. The Trust Funds Established Under The Industrial Insurance Act May Only Be Used To Pay Benefits Chargeable To Such Funds

1. Industrial Insurance Funds Are Entrusted To The Department And May Only Be Used For The Specific Purposes Enumerated In The Industrial Insurance Act

Under the Industrial Insurance Act, the Department is entrusted with the responsibility of administering industrial insurance benefits. RCW 43.22.030(1); RCW 51.04.020. In this capacity, the Department is tasked with protecting the funds it holds in trust for injured workers and administering such funds to ensure benefits are available to such workers.

The various funds created under the Industrial Insurance Act are "trust funds drawn from particular sources and devoted to special purposes." *State ex rel. Trenholm v. Yelle*, 174 Wash. 547, 550, 25 P.2d

569 (1933); *see also Mason-Walsh-Atkinson-Kier Co. v. Dep't of Labor & Indus.*, 5 Wn.2d 508, 515, 105 P.2d 832 (1940) ("funds created by the act, together with the revenues by which they are sustained, are trust funds devoted to the special purposes designated by the act.") Industrial insurance funds are "trust funds" in the sense that "the 'idea of industrial insurance' imposes upon the state the moral and legal obligation to use the revenues for the declared purpose for which it collects them." *State ex rel. Crabb v. Olinger*, 196 Wash. 308, 318, 82 P.2d 865 (1938), *overruled on other grounds by St. Paul & Tacoma Lumber Co. v. Dep't of Labor & Indus.*, 19 Wn.2d 639, 144 P.2d 250 (1943).

Each fund is unique and intended to be used for specific benefits. The legislature determines which benefits are to be paid from which funds. Here, the superior court erred because it ordered the Department to pay for the costs of a self-insured employee's post-pension medical treatment with funds that are not collected for or devoted to such a purpose. This error requires reversal.

2. The Industrial Insurance Act Requires Disability And Medical Benefits To Be Paid Either Out Of Distinct Funds Maintained For Such Purposes Or Directly By A Self-Insured Employer

Injured workers are entitled to a variety of disability and medical benefits under the Industrial Insurance Act. Disability benefits include

wage replacement benefits (temporary total disability, temporary partial disability, and permanent total disability) and permanent partial disability awards. RCW 51.32.090(1), (3), .060, .080; WAC 296-14-4124; WAC 296-17-855. Medical benefits include proper and necessary medical treatment. RCW 51.36.010(2)(a).

For employers insured with the state fund,[1] disability and medical benefits are paid out of two different funds. Disability benefits are generally paid out of the accident fund.[2] *WR Enters., Inc. v. Dep't of Labor & Indus.*, 147 Wn.2d 213, 216-17, 53 P.3d 504 (2002). Medical benefits are paid out of the medical aid fund. *Id.* at 217.

The accident fund and medical aid fund are distinct. RCW 51.44.010, .020. They are funded by different revenue sources and are not interchangeable. Accident fund premiums are paid solely by employers. *Yelle*, 174 Wash. at 550. Employers and employees are responsible for paying medical aid fund premiums. RCW 51.16.140(1)

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[1] The "state fund" refers to moneys held in trust by the Department for the purpose of administering workers' compensation benefits for employers who secure industrial insurance through the state. RCW 51.08.175. State fund employers pay four types of industrial insurance premiums: (1) accident fund premiums, (2) medical aid fund premiums, (3) supplemental pension fund premiums, and (4) stay-at-work program premiums. WAC 296-17-31024. Only the first two funds are relevant to this appeal.

[2] Under a vocational pilot program in effect from January 1, 2008, through June 30, 2013, vocational plan costs are paid out of the medical aid fund in limited circumstances. RCW 51.32.099(1)(a). Vocational plan costs include temporary total disability benefits payable while an injured worker is participating in a vocational plan. RCW 51.32.0991(2). Outside of this unique circumstance, temporary total disability benefits are paid out of the accident fund.

("Every employer who is not a self-insurer shall deduct from the pay of each of his or her workers one-half of the amount he or she is required to pay, for medical benefits within each risk classification.").

If an employer opts to insure itself, rather than through the state, the self-insured employer directly pays its injured employees' disability and medical benefits. *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 742, 630 P.2d 441 (1981); RCW 51.08.173; RCW 51.14.020(1); WAC 296-15-330, -340. "The basic premise of the Workmen's Compensation Act is that industry is to bear the burden of the costs arising out of industrial injuries sustained by its employees." *Jussila v. Dep't of Labor & Indus.*, 59 Wn.2d 772, 779, 370 P.2d 582 (1962). Payment of such costs "is the consideration which the owners of the industries pay" for engaging in business within the state. *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 203, 117 P. 1101 (1911).

As a self-insured employer, Boeing is responsible for all disability and medical costs associated with its employees' industrial insurance claims, including the costs of Doss' medical treatment. *See* RCW 51.08.173; RCW 51.14.020(1); RCW 51.44.070(1); WAC 296-15-330(1). There is no statute relieving Boeing of its responsibility to pay for Doss' post-pension medical treatment.

3. A Permanently Totally Disabled Worker Employed By A Self-Insured Employer Receives Disability Benefits Out Of A Pension Reserve Fund And, In Limited Circumstances, May Receive Medical Treatment Paid Directly By The Self-Insured Employer

A worker who is permanently totally disabled as a result of an industrial injury receives a monthly payment representing a percentage of his or her wages at the time of injury, referred to as a "pension," for the remainder of his or her life. RCW 51.32.060(1). A pension is a type of disability benefit. *See* RCW 51.32.060; WAC 296-17-855. When a state fund worker is determined to be permanently totally disabled, the Department transfers from the accident fund to a pension reserve fund a sum equal to the "the estimated present cash value of the monthly payments provided for it" based on an annuity. RCW 51.44.070(1). The annuity is "based upon rates of mortality, disability, remarriage, and interest as determined by the department, taking into account the experience of the reserve fund in such respects." RCW 51.44.070(1).

When a worker is injured at a state fund employer's workplace, the worker's pension reserve is funded with premiums taken from the accident fund. The amount transferred to the pension reserve is based on the estimated period of time the worker will receive disability benefits. It does not take into account future medical costs. When a worker is injured at a self-insured employer's workplace, the self-insured employer directly

pays a similar amount into a pension reserve fund or files a bond, assigns an account, or purchases a specified type of annuity to cover the costs of the pension reserve. RCW 51.44.070(1), (2), .140.

In most circumstances, a pensioned worker is no longer entitled to medical benefits. RCW 51.36.010(4) (medical treatment ends when an injured worker is placed on a pension).[3] There is a narrow exception to this rule.

> [T]he supervisor of industrial insurance, solely in his or her discretion, may authorize continued medical and surgical treatment for conditions previously accepted by the department when such medical and surgical treatment is deemed necessary by the supervisor of industrial insurance to protect such worker's life or provide for the administration of medical and therapeutic measures including payment of prescription medications[.]

RCW 51.36.010(4). This is what occurred in this case. Although Doss is permanently totally disabled, the Department determined she is entitled to receive certain post-pension treatment for her asthma. BR at 74. The need for this treatment is caused, in part, by the exposure she sustained while employed by Boeing. BR at 67, ¶ 4.

A self-insured employer must pay any post-pension medical treatment costs directly as such costs cannot be paid out of a pension

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[3] RCW 51.36.010 was amended effective July 1, 2011. The current version of the statute is used in this brief as the portion of the statute governing the duration of medical benefits, although renumbered, was not substantively altered. *See* Laws of 2011, c. 6 § 1.

reserve. Wage replacement benefits are paid out of the pension reserve. RCW 51.32.060(1); RCW 51.44.070(1). Medical benefits are not paid out of a pension reserve. Instead, the Board has determined post-pension medical treatment costs in the case of a state fund employer must be paid out of the medical aid fund. *In re Crella Boudon*, No. 98 17459, 2000 WL 245825, at *5 (Wash. Bd. of Indus. Ins. Appeals Jan. 26, 2000).

As noted above, a self-insured employer is responsible for paying its injured workers' pension reserves. RCW 51.44.070(1). Any "disbursements" from a pension reserve paid by a self-insured employer must be the same as the disbursements that would be paid out of a state fund pension reserve. RCW 51.44.070(1). Like a state fund pension reserve, a self-insured pension reserve cannot be used to pay medical costs. Because a self-insured employer is responsible for paying its workers' medical benefits and such benefits are not paid from the medical aid fund, the self-insured employer is responsible for paying the costs of post-pension medical treatment. *In re Boudon*, 2000 WL 245825, at *5; *see Johnson*, 95 Wn.2d at 742 ("[i]f an employer is self-insured . . . the benefits are paid directly to the employees by the self-insured employers."). As a self-insurer, Boeing is responsible for the costs of Doss' post-pension medical treatment.

B. The Second Injury Fund Cannot Be Used To Pay The Costs Of Doss' Post-Pension Medical Treatment Because Such Costs Are Not A Charge Under RCW 51.16.120 Or RCW 51.32.250

Boeing seeks to evade its responsibility for the payment of Doss' post-pension medical treatment under RCW 51.44.040 ("Second injury fund"). In addition to the funds discussed above, the Industrial Insurance Act creates a "'second injury fund', which shall be used *only* for the purpose of defraying charges against it as provided in RCW 51.16.120 and 51.32.250." RCW 51.44.040(1) (emphasis added). The second injury fund is intended to promote the hiring and retention of disabled workers by "providing that the employer hiring the disabled worker will not be liable for a greater disability than what actually results from a later accident." *Crown, Cork & Seal v. Smith*, 171 Wn.2d 866, 873, 259 P.3d 151 (2011). The second injury fund, like other industrial insurance funds, is a trust fund as the state is entrusted with premiums collected from employers to pay for the specific charges listed in RCW 51.44.040(1).

Under the plain language of RCW 51.44.040(1), the Department may use second injury funds *only* for paying charges under two specific statutory provisions – RCW 51.16.120 and RCW 51.32.250. In construing a statute, a court seeks to ascertain the legislature's intent. *Christensen*, 162 Wn.2d at 372. "'[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative

intent.'" *Id.* at 372-73 (quoting *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 9) (alteration in original). "Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Christensen*, 162 Wn.2d at 373.

The legislature's intent is clear. If post-pension medical benefits are not covered by one of the two statutes listed in RCW 51.44.040, they cannot be paid out of the second injury fund.

1. Medical Treatment Is Not A Charge Under RCW 51.16.120

There are three types of charges identified in RCW 51.16.120. First, RCW 51.16.120(1) grants a self-insured employer relief from the payment of a portion of the accident cost required to fund a pension reserve. Specifically, the self-insured employer is required to "pay directly into the reserve fund only the accident cost which would have resulted solely from the further injury or disease, had there been no preexisting disability[.]" RCW 51.16.120(1). This amount, determined by medical experts, is the amount of permanent partial disability resulting from the new injury or occupational disease. RCW 51.16.120(1) (the "accident costs shall be based upon an evaluation of the disability by medical experts"); *see In re Fred Dupre*, No. 97 4784, 1999 WL 756236,

at *4 (Wash. Bd. of Ind. Ins. Appeals July 21, 1999). When second injury fund relief applies, the difference between the total cost of the pension reserve and the cost of the permanent partial disability paid by the self-insured employer is "assessed against the second injury fund." RCW 51.16.120(1).

RCW 51.16.120(1) addresses accident costs, not medical costs. The self-insured employer is responsible for paying only a portion of the accident cost – in this case, a permanent partial disability award equal to $22,237.07. BR at 77. The second injury fund is responsible for paying the remainder of the accident cost, which is the total permanent disability benefit, because the cost of a pension reserve is an estimate of future wage replacement benefits. Post-pension medical costs are not part of the total cost of the pension reserve because the pension reserve, as explained above, is based on an annuity that estimates future payments of wage replacement benefits. RCW 51.44.070(1). The pension reserve does not account for medical benefits and, consequently, the amount transferred from the second injury fund to the pension reserve does not include medical treatment costs. Post-pension medical costs are a type of medical benefit, not a disability benefit chargeable to the accident fund, and, thus, are not a charge pursuant to RCW 51.16.120(1).

The second charge is found in RCW 51.16.120(4), which allows the Department to reduce or eliminate charges to an employer when a worker who was previously injured and unemployed is subsequently hired and suffers a new injury. This is known as the "preferred worker" program. *See* WAC 296-16-100 to -170; WAC 296-17A-7204. The third charge is found in RCW 51.16.120(5) and applies to the employment of developmentally disabled workers. These subsections do not apply in this case because Doss was not a preferred worker or a developmentally disabled worker.

In conclusion, RCW 51.16.120 does not address medical benefits and, thus, it does not relieve a self-insured employer from paying for the costs of medical treatment for one of its injured workers. Boeing was responsible for Doss' treatment before she was placed on a pension and its responsibility to pay such costs continues to the present.

2. Medical Treatment Is Not A Job Modification Benefit Under RCW 51.32.250

The second injury fund may also be used to cover benefits under RCW 51.32.250. RCW 51.44.040(1). Under RCW 51.32.250, the Department may provide a worker with up to five-thousand dollars in job modification benefits. A job modification is an alteration to an employment condition that enables a worker to be able to perform a job.

See WAC 296-19A-180. Job modification costs are charged to the second injury fund. RCW 51.32.250. Medical treatment is not a job modification and, thus, this provision of RCW 51.44.040(1) is inapplicable.

3. Medical Treatment Costs Cannot Be Paid Out Of The Second Injury Fund Because The Second Injury Fund May Only Be Used To Pay The Charges Listed In RCW 51.44.040

The second injury fund is intended to relieve an employer, in part, of the costs of an injured worker's disability when his or her inability to work is due to the combined effects of an injury and a previous disability. The fund does not offset all costs of a claim. *Crown, Cork & Seal*, 171 Wn.2d at 872 (the fund "is used to *partially* relieve an employer's costs related to an injured worker's pension") (emphasis added).

The second injury fund is not intended to relieve a self-insured employer of its responsibility to pay for medical treatment for an injury sustained by its employee. If the legislature had intended for a self-insured employer to be relieved from paying post-pension medical treatment costs, it could have clearly indicated such by listing RCW 51.36.010(4) in the statement of what charges may be paid out of the second injury fund. Principles of statutory construction indicate the exclusion of RCW 51.36.010(4) (providing for post-pension medical treatment) demonstrates the legislature's intent to not have such costs paid

out of the second injury fund. Under the canon of expressio unius est exclusio alterius, "to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions." *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). The legislature did not intend for medical costs to be paid from the second injury fund because they are not "charges" "provided in RCW 51.16.120 and 51.32.250." *See* RCW 51.44.040(1).

Under the plain language of RCW 51.44.040(1), the second injury fund cannot be used to pay post-pension medical costs because such costs are not an accident cost under RCW 51.16.120 or a job modification cost under RCW 51.32.250. To order the Department to pay the costs of Doss' treatment is contrary to statute and would violate the trust nature of the second injury fund.

4. The Superior Court's Assessment Of Post-Pension Medical Treatment Costs Against The Second Injury Fund Unfairly Shifts These Costs To State Insured Employers

As set forth above, when a self-insured employer is granted second injury fund relief, the amount required to fund the worker's pension reserve in excess of the amount of the permanent partial disability award is transferred from the second injury fund. RCW 51.16.120(1). The second injury fund has two revenue sources. For state fund employers, funds are

transferred from the accident fund into the second injury fund to cover the pension reserve. RCW 51.44.040(2). The pension reserve, and thus the amount transferred from the accident fund, does not account for medical costs. The reserve is based on an estimate of the amount of disability benefits the worker will receive for the remainder of his or her life. Consequently, the Department, by statute, does not transfer funds to pay for post-pension medical costs into the second injury fund when an employer is granted second injury fund relief.

The second injury fund is also funded with premiums assessed against self-insured employers. Premiums paid by self-insured employers into the second injury fund do not account for post-pension medical benefits. Self-insured employers pay a specific second injury fund assessment proportional to the amount the self-insured employer utilizes the second injury fund. RCW 51.44.040(3). The premium calculation accounts for the amount of "expenditures made by the second injury fund for claims of the self-insurer[.]" RCW 51.44.040(3)(a)(ii). "Expenditures from the second injury fund" are defined to include payments for job modification costs, claim costs for preferred workers, and the total pension reserve for a worker minus the accident cost paid by the self-insured employer. RCW 51.44.040(3)(b) (listing costs from RCW 51.32.250;

RCW 51.16.120(1), (3), (4)). Again, this does not include post-pension medical benefits.

Post-pension medical costs are not used to calculate a self-insured's obligation to pay for its proportional use of the second injury fund. RCW 51.44.040(3)(a)(ii), (b). If Boeing is correct in its argument that post-pension medical costs are to be paid out of the second injury fund, Boeing would not be charged with any of the responsibility for such costs, directly or indirectly. Furthermore, as such costs are not used in calculating self-insurers' second injury fund assessments, the continued solvency of the second injury fund would be the responsibility of state fund employers. This unfairly shifts the burden to state fund employers and, as noted above, is inconsistent with the applicable statutes.

C. The Board's Determination That A Self-Insured Employer Is Responsible For Post-Pension Medical Costs Is Entitled To Deference And Should Be Followed By This Court

This Court should follow the Board's interpretation of RCW 51.44.010(1) and determine Boeing is responsible for the costs of Doss' post-pension medical treatment. The Board's interpretation of the Act is "entitled to great deference." *Weyerhauser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991). "While not binding, significant decisions published by the Board are persuasive authority." *Magee v. Rite Aid*, 167 Wn. App. 60, 75, 277 P.3d 1 (2012).

In the significant decision of *In re Boudon*, 2000 WL 245825, the Board determined a self-insured employer was responsible for the costs of post-pension medical treatment when second injury fund relief was granted because medical costs are not accounted for in a pension reserve. *Id.* at *5. The Board reasoned that if a case involved a state fund employer, post-pension medical costs would have to be paid out of the medical aid fund, not the second injury fund. *Id.* at *5. As a self-insured employer "stands in the shoes of the Department with respect to payment of medical benefits[,]" it is likewise responsible for payment of post-pension medical benefits. *Id.* at *5.

The Board has consistently adhered to this position. *See, e.g.*, *In re Pamela Campbell-Fox*, Dckt. No. 05 10890, 2006 WL 980486 (Wash. Bd. of Indus. Ins. Appeals Jan. 17, 2006); *In re Janet Tull*, Dckt. No. 04 10717, 2006 WL 980490 (Wash. Bd. of Indus. Ins. Appeals Jan. 18, 2006); *In re Theron Larrabee*, Dckt. No. 05 10559, 2006 WL 2989424 (Wash. Bd. of Indus. Ins. Appeals June 26, 2006). In *In re Pamela Campbell-Fox*, 2006 WL 980486, the Board reexamined its interpretation. It determined the sole relief afforded to an employer granted second injury fund relief, as reflected in the plain language of RCW 51.16.120(1), was "relief from a portion of the cost of permanent disability benefits[,]" not medical costs. *Id.* at *2. In that case, the self-insured employer argued the

Board should abandon its *Boudon* decision as it had been reversed by a superior court. The Board correctly rejected this argument, noting, "[a] superior court's reversal of a Board decision does not affect our ability to continue applying its holding. Superior court decisions have no precedential value; are not binding on the Board; and are simply the law of that particular case." *Id.* at *3.

The Board's expertise in interpreting the various provisions of the Industrial Insurance Act and its understanding of the various types of funds involved are grounds for this Court to defer to its interpretation. The Board has correctly determined medical costs can only be paid out of the medical aid fund or directly by self-insured employers. Such costs cannot be charged against the second injury fund.

D. The Superior Court Erred By Relying On A Previous Superior Court Decision In A Different Case As Precedential Authority

In this case, the superior court erred because it rejected the Board's interpretation, relying instead on a previous superior court determination in a different case. In reversing the Board's order, the court explicitly stated, "This Court relied in part on *DLI v. Boudon* CO-2-05612-5KNT, using this decision as precedent, as the court was acting in its appellate capacity." CP at 60. The superior court's reliance on a nonprecedential decision was incorrect.

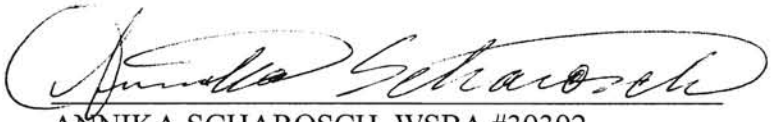
Regardless of whether a superior court is acting as the initial trier of fact or reviewing an agency's conclusions of law de novo, its decisions are not authoritative and have no precedential effect. Superior court opinions are not authoritative. *Tunstall*, 141 Wn.2d at 224 n.19. "Stare decisis is not applicable to a trial court decision because 'the findings of fact and conclusions of law of a superior court are not legal authority and have no precedential value.'" *In re Estate of Jones*, 170 Wn. App. 594, 605, 287 P.3d 610 (2012) (quoting *Bauman v. Turpen*, 139 Wn. App. 78, 87, 160 P.3d 1050 (2007)). A superior court does not become the Court of Appeals simply because it is reviewing an agency determination. The superior court in this case erred in granting precedential effect to a previous superior court decision. The Court should reverse the superior court's order and affirm the Board's determination ordering Boeing to pay the costs of Doss' post-pension medical treatment.

VII. CONCLUSION

For the aforementioned reasons, the Department respectfully requests this Court reverse the superior court's determination and order Boeing to pay the costs of Doss' post-pension medical treatment.

RESPECTFULLY SUBMITTED this 14th day of March, 2013.

ROBERT W. FERGUSON
Attorney General



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