SUPREME COURT NO. 90304-2

COURT OF APPEALS NO. 69759-5-I

SUPREME COURT OF THE STATE OF WASHINGTON

BOEING COMPANY,

Respondent,

v.

PATRICIA DOSS,

Defendant,

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is the State of Washington, Department of Labor and Industries (Department).

II. COURT OF APPEALS' DECISION

The Department seeks review of the Court of Appeals, Division One's, decision in *Boeing Co. v. Patricia Doss, State of Washington, Department of Labor & Industries*, Cause No. 69759-5-I. The decision was issued on March 31, 2014. A copy of the slip opinion is contained in Appendix A.

III. ISSUE PRESENTED

When the combined effects of a preexisting disability and an industrial injury or exposure cause an employee to be permanently totally disabled, part of the employee's pension reserve is paid out of the second injury fund in accordance with RCW 51.16.120(1). A pension reserve funds wage replacement benefits for the remainder of a worker's life; it does not cover potential medical costs. Does RCW 51.16.120(1) relieve a self-insured employer of its responsibility to pay for post-pension medical treatment when the statute addresses funding of the pension reserve for permanent disability and not medical costs?

IV. STATEMENT OF THE CASE

A. Patricia Doss Requires Lifelong Medical Treatment Because of Chemical Exposure at Boeing

Patricia Doss filed a workers' compensation claim in 2000 for chemical exposure to her lungs while employed by The Boeing Company (Boeing), a self-insured employer. Board of Industrial Insurance Appeals Record (BR) at 80. Before her exposure at Boeing, Doss suffered from symptomatic asthma and was permanently restricted in her work as a result. BR at 66-67. The chemical exposure Doss sustained while employed by Boeing permanently aggravated her pre-existing asthma. BR at 67. Doss's workers' compensation claim was allowed and she received medical treatment and wage replacement benefits. *See* BR at 43-46, 73-74, 82-84.

The Department determined Doss was permanently totally disabled in 2008 due to the combined effects of the permanent aggravation of her pre-existing asthma and a right knee injury. BR at 73, 83. A permanently totally disabled worker receives a wage replacement benefit called a pension. *See* RCW 51.32.060(1). A pensioned worker may also receive medical treatment under certain circumstances, including the need for life sustaining treatment. RCW 51.36.010(4).

After the Department determined Doss was permanently totally disabled, it considered whether Boeing was entitled to second injury fund relief. The second injury fund relieves an employer from its responsibility for funding the full cost of a pension reserve when a worker is permanently totally disabled as a result of the combined effects of a pre-existing disability and an industrial injury or exposure. RCW 51.16.120(1). The Department granted Boeing second injury fund relief. BR at 77. Boeing was directed to pay the permanent partial disability attributable to the workplace injuries at Boeing in the amount of $22,237.07 with the "balance of the pension reserve" being charged to the second injury fund. BR at 77.

The Department also authorized continued medical treatment for Doss's asthma, specifically asthma medications and one medical visit a month to monitor her medications. BR at 74. The need for this ongoing treatment is a result of Doss's pre-existing asthma and the permanent aggravation of her asthma condition sustained as a result of her exposure at Boeing. BR at 67. Boeing sought to have the second injury fund pay for the cost of Doss's treatment.

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B. The Department and Board of Industrial Insurance Appeals Denied Boeing's Claim for Second Injury Relief Because Treatment Costs Are Not Chargeable to a Pension Reserve

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's ongoing post-pension medical treatment. BR at 89. Boeing appealed this letter to the Board of Industrial Insurance Appeals (Board); the Board affirmed the Department's letter and ordered Boeing to pay for the costs of Doss's treatment. BR at 2-5. The Board relied on its significant decision, *In re Crella Boudon*, No. 98 17459, 2000 WL 245825 (Wash. Bd. of Indus. Ins. Appeals Jan. 26, 2000), to reach this decision. BR at 4. The Board has determined post-pension medical costs are not payable out of the second injury fund because medical costs are "not an anticipated cost that is built into the pension reserve. To pay the cost of the ongoing benefits from the pension reserve would deplete the funds placed in the reserve to cover the cost of the pension over the life of the worker." *Boudon*, 2000 WL 245825, at *5. From this, the Board reasoned medical benefits, in the case of a state fund employer, would need to be paid out of the medical aid fund rather than the second injury fund and, thus, a self-insured employer should be responsible for paying such benefits. *Id.* In a subsequent case, the Board further explained, "[t]he plain language of RCW 51.16.120(1) demonstrates that the sole relief

provided therein is a reduction of a self-insured employer's responsibility for permanent disability benefits." *In re Pamela Campbell-Fox*, No. 05 10890, 2006 WL 980486, at *2 (Wash. Bd. of Indus. Ins. Appeals Jan. 17, 2006).

C. The Superior Court Reversed the Board and the Court of Appeals Affirmed

Boeing appealed to superior court. The superior court reversed the Board's determination, concluding Doss's post-pension medical costs should be paid out of the second injury fund. CP at 57-61. The Department appealed to the Court of Appeals, which affirmed the trial court's ruling. The Court of Appeals concluded the Department was responsible for paying the costs of Doss's post-pension medical treatment based on the language of RCW 51.16.120(1), the purpose of the second injury fund, and because it believed a contrary holding would result in self-insured employers bearing a different financial burden than state fund employers. Appendix A. The Department now petitions this Court for review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case warrants review under Rules of Appellate Procedure 13.4(b) as it presents an issue of substantial public interest. The Court of Appeals' decision fundamentally alters the relationship between the

Department and all self-insured employers who are granted second injury fund relief with respect to administering post-pension medical treatment benefits. Before the Court of Appeals' decision, self-insured employers were responsible for administering and financing their employees' workers' compensation claims, including post-pension medical benefits. This is consistent with two important principles. First, placing the responsibility of claim costs on the employer encourages worker safety. Second, self-insured employers seek to obtain a financial benefit by insuring themselves, but are required to administer and finance claims to obtain that benefit.

Under the Court of Appeals' decision, once a self-insured employer is granted second injury fund relief, it is only responsible for paying the permanent partial disability attributable solely to the injury sustained at its workplace. Appendix A, Slip Op. at 3, 8. Other costs, including post-pension medical treatment, are charged to the second injury fund. To reach this conclusion, the Court of Appeals read words out of the statute. The statute, by its terms, only addresses accident costs and pension reserves. It does not address or apply to medical costs.

The Court of Appeals' decision creates an exception to the industrial insurance scheme that is not found in the Industrial Insurance Act, RCW Title 51. This case involves an issue of substantial public

interest as the Court of Appeals' decision does not encourage worker safety, alters all self-insured employers' responsibilities, and will result in increased second injury fund assessments.

A. The Court of Appeals Erred by Focusing on Two Phrases in RCW 51.16.120(1) to the Exclusion of the Remaining Statutory Language

The plain language of RCW 51.44.040 and 51.16.120(1), read in light of the Industrial Insurance Act, dictate the second injury fund cannot be used to relieve a self-insured employer from its responsibility to pay for medical treatment necessitated by a condition proximately caused by an injury or exposure sustained at its workplace. The second injury fund may only be used for the specific purposes identified by the Legislature. RCW 51.44.040(1). Post-pension medical treatment is not one of those purposes.

A self-insured employer is one who has opted to insure its own industrial insurance liabilities rather than obtaining coverage through the state. A self-insured employer is directly responsible for administering its own claims and paying 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. This includes the responsibility for paying for any proper and necessary medical treatment proximately caused by exposure or injury at

the workplace. 6A *Washington Pattern Jury Instructions: Civil* 155.06 (6th ed. 2012) (WPI); *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 684, 571 P.2d 229 (1977); *see Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 116-17, 206 P.3d 657 (2009). The exposure or injury need not be the sole or even the primary cause for the need for such treatment. WPI 155.06 ("The law does not require that the industrial injury be the sole proximate cause of such condition."). Thus, the basic premise from which the issue presented must be addressed is that Boeing is responsible for paying for the costs of Doss's medical treatment because the need for such treatment is proximately caused by her exposure at Boeing, even if she had a pre-existing condition, unless Boeing can identify a statute relieving it of that responsibility. The Court of Appeals improperly concluded RCW 51.16.120(1) provides such relief.

This statute addresses payments to the pension reserve when a previously disabled worker incurs a subsequent injury:

> [w]henever a worker has a previous bodily disability from any previous injury of disease, whether known or unknown to the employer, and shall suffer a further disability from injury or occupational disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof . . . then the experience record of an employer insured with the state fund at the time of the further injury or disease shall be charged and a self-insured employer *shall 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, and which accident cost shall be based upon an evaluation of the disability by medical experts. *The difference between the charge thus assessed to such employer at the time of the further injury or disease and the total cost of the pension reserve shall be assessed against the second injury fund.*

RCW 51.16.120(1) (emphases added).[1] Under the statute, the employer of a previously disabled worker only pays into the pension reserve the amount of disability caused solely by the subsequent injury. Thus, it is the payment to the pension reserve that is relevant, and medical costs, as explained below, are not charged to the pension reserve.

The Court of Appeals erred by focusing on the terms "only" and "solely" in RCW 51.16.120(1) to the exclusion of the rest of the statutory language:

> The plain language of RCW 51.16.120(1) requires a self-insured employer to pay "only the accident cost which would have resulted solely from the further injury or disease, had there been no preexisting disability." The second injury fund pays "[t]he difference between the charge thus assessed to such employer at the time of the further injury or disease and the total cost of the pension reserve." Thus, the statute requires Boeing to pay only the costs necessitated solely by Doss's industrial exposure and no more. The Department makes no claim that Doss's need for post-pension medical care resulted solely from chemical exposure at Boeing. Thus, Boeing cannot be required to pay for this care.

Appendix A, Slip Op. at 8 (internal footnote omitted).

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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.

The terms "only" and "solely" must be read within the context of the paragraph and sentence containing these terms. When the terms "only" and "solely," which the Court of Appeals focused on, are read in the context of the sentence and paragraph containing these terms, it is apparent the Legislature was specifying a self-insured employer's obligations for funding an employee's pension reserve. The statute does not purport to address non-pension reserve obligations and it is silent with respect to other costs, like medical treatment.

RCW 51.16.120(1), by its terms, is limited to pension reserve costs. The accident cost paid by the self-insured employer is paid into the "reserve fund," meaning the pension reserve fund. RCW 51.16.120(1). Of the payments due to the pension reserve, only the accident costs that would have resulted solely from the second injury are paid by the self-insured employer. This amount, determined by medical experts, is the amount of permanent partial disability resulting from the new injury or occupational disease. *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 fund" 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).

Thus, the only allowable charge to the second injury fund under RCW 51.16.120(1) is the *difference* between the total cost of a pension reserve and the permanent partial disability cost paid by the self-insured employer. The statute does not address other costs of a claim, such as vocational or medical benefits.

Medical costs are not a pension benefit, nor are they accounted for when calculating a worker's pension reserve. 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, 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(1); WAC 296-17-855. When an employee is determined to be permanently totally disabled, either the Department or the self-insured employer, depending on the case, transfers to the employee's pension reserve fund a sum equal to "the estimated present cash value of the monthly payments provided for it" based on an annuity. RCW 51.44.070(1)-(2), .140. 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). Post-pension medical costs are not part of the total cost of the pension reserve because the pension reserve is based on an annuity that estimates future payments of wage replacement benefits. RCW 51.44.070(1). The pension reserve is not used to pay for the costs of medical treatment, nor is it funded to do so.

RCW 51.16.120(1) only relieves a self-insured employer from paying the full cost of an injured worker's pension reserve. It does not address, and thus cannot extend to, other claim costs, such as the payment of medical benefits.

B. The Second Injury Fund is Not Used to Pay for Post-Pension Medical Treatment for Workers of Self-Insured Employers or State Fund Employers and the Need for Self-Insured Employers to Directly Pay for Their Workers' Post-Pension Medical Benefits is the Result of the Employers Choosing to Self-Insure

The Court of Appeals' omission of critical statutory language led to its failure to distinguish between post-pension medical treatment costs and pension reserves. This failure is most apparent on pages ten and eleven of the Court of Appeals' opinion, where it states a contrary holding would result in "disparate financial treatment of self-insured employers." Appendix A, Slip Op. at 11. Under a proper reading of RCW 51.16.120(1), the second injury fund is not used to pay for medical

expenses regardless of whether the worker's employer is self-insured or insured through the state fund.

Contrary to the court's reasoning, under the Department's reading of RCW 51.16.120(1), self-insured employers and state fund employers are treated similarly. In both cases, the employer is relieved of paying for or being charged for the entire cost of the worker's pension reserve. In contrast to the Court of Appeal's statement on page ten, both employers are responsible for paying for the permanent partial disability resulting solely from the injury or exposure at their workplace either directly or as a charge to their experience rating.[2] Neither employer is relieved of its responsibility for post-pension medical benefits.

The self-insured employer, because it has opted to insure itself, is directly responsible for paying for post-pension medical benefits. The state fund employer, because it has opted to insure through the state, has such costs paid by the medical aid fund and charged against its experience rating. As the Department explained in its supplemental brief to the court, if a state fund employer is awarded second injury fund relief, post-pension medical benefits are paid out of the medical aid fund. Supplemental Br. of

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[2] The Court of Appeals' statement on page ten, "the state fund employer is entitled to have the pension paid from the second injury fund without any charges to the employer's account," is contrary to the plain, unambiguous language of RCW 51.16.120(1). *See* Appendix A, Slip Op. at 10. The experience record of a state fund employer "shall be charged . . . the accident cost which would have resulted solely from the further injury or disease[.]" RCW 51.16.120(1).

Appellant at 3-9. Payments from the medical aid fund are taken into account when determining a state fund employer's industrial insurance premiums.[3] WAC 296-17-855, -870. Whether the charges actually affect a state fund employer's experience rating depends on the timing of the payments in relation to the final valuation of the claim, which occurs between 35 and 47 months after the date of injury or exposure. *See generally* WAC 296-17-850, -855, -870.

The financial effect of the Department's method of calculating a state fund employer's industrial insurance premiums is not the result of disparate or preferential treatment in the administration of the second injury fund. The second injury fund is not used to pay medical costs for the injured employees of self-insured employers or state fund employers. Instead, requiring a self-insured employer to directly pay medical costs versus having the costs charged to a state fund employer's account is one of the consequences of an employer choosing to insure itself. The Court of Appeal's conclusion that Boeing must be granted second injury fund relief in this case because "a self-insured employer should not bear a financial burden different from a state fund employer," Appendix A, Slip

[3] State fund employers' premiums are calculated by a formula that includes a base rate for a particular type of employment, referred to as a risk classification, and a specific employer's experience rating. WAC 296-17-31010 (factors involved in determining premiums), -31011(1) (base rate calculations), -31024 (calculation of premiums), -850 through -870 (rules governing calculations of experience ratings), -895 (listing current base rates).

Opinion at 11, is a fundamental misunderstanding of the industrial insurance scheme and the differences between self-insured and state fund employers. The choice to self-insure is an employer's, and the employer, who hopes to gain more benefits than liabilities as a result of self-insuring, should not be able to assert it has been unjustly burdened when it is held responsible for its own costs. The Court of Appeals incorrectly insinuated a state fund employer would not be affected by the payment of post-pension medical benefits and further erred when it used this premise to conclude it would be unjust to make a self-insured employer responsible for paying for its workers' post-pension medical benefits.

Furthermore, the Court of Appeals believes "[i]ncluding treatment costs as part of the total claims costs considered for the self-insured employer's assessments indicates that the Legislature intended for the Department to pay from the second injury fund the costs of post-pension medical treatment after it grants second injury fund relief." Appendix A, Slip Op. at 10. But no such inference can be drawn. RCW 51.44.040(3)(a)(ii) requires a self-insured employer's second injury fund assessment to account for its experience rating. The experience rating includes a comparison of the self-insured employer's "workers' compensation claim payments" to the sum of all self-insured employers' "workers' compensation claim payments[.]" RCW 51.44.040(3)(a)(ii);

see WAC 296-15-221(4)(a)(ii) (defining claims costs), -225(3)(c)(ii) (assessment calculation formula). This legal requirement does not mean all claim payments made by self-insured employers, such as time loss compensation, permanent partial disability awards, medical bills, and vocational rehabilitation expenses, are subject to second injury fund relief. To the contrary, only those costs specifically identified by the Legislature in RCW 51.44.040(1) may be charged to the second injury fund and post-pension medical treatment is not one of them.

C. This Case Involves an Issue of Substantial Public Interest as the Court of Appeals' Decision Does Not Encourage Worker Safety, Alters All Self-Insured Employers' Responsibilities, and Will Result in Increased Second Injury Fund Assessments

The Court of Appeals' decision significantly alters the responsibilities of self-insured employers. "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). By bearing the expense of injuries, employers are encouraged to keep their workers safe to lower their claim costs. *Id.* Although the second injury fund serves as a means to encourage hiring of previously disabled workers, it does not change the fundamental premise of workers' compensation law. *See id.* Boeing, like all self-insured employers, should

be held responsible for the costs of medical treatment caused by exposure at its workplace to encourage future safety measures.

The Court of Appeals' decision also shifts administration and financing duties to the Department. If an employer opts to insure itself, rather than through the state, the self-insured employer directly administers its own claims and pays its injured employees' disability and medical benefits. *Johnson*, 95 Wn.2d at 742; RCW 51.08.173; RCW 51.14.020(1); WAC 296-15-330, -340. While the Department has the ability to monitor the self-insured's actions to ensure claims are handled properly, the self-insured employer remains responsible for administering and paying benefits. *Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919, 924, 83 P.3d 1018 (2004); RCW 51.32.190(6).

Currently, the Department is responsible for determining whether a worker is permanently totally disabled and entitled to post-pension medical treatment. RCW 51.32.055(2); RCW 51.36.010(4). Once such determinations are made, the self-insured employer is responsible for evaluating whether particular medical bills fall within the authorized treatment and then paying the proper charges. WAC 296-15-330(1) ("Every self-insurer must: (1) Authorize treatment and pay bills in accordance with Title 51 RCW and the medical aid rules and fee schedules of the state of Washington."). The Department's involvement is limited to

ensuring benefits are properly paid and resolving disputes between workers and self-insured employers. *See* RCW 51.32.190(1), (5), (6); RCW 51.48.017. Under the Court of Appeals' decision, the self-insured employer's responsibilities are transferred to the Department contrary to the scheme created by the Legislature. This imposes on the Department administrative and financing duties not contemplated by the Legislature, while relieving the self-insured employer of such duties. This shift in responsibilities is not inconsequential as a significant number of post-pension medical treatment bills are submitted each year.

Finally, while the decision affords Boeing relief in this particular case, it spreads the costs of such relief among self-insured employers throughout the state. The second injury fund is funded by assessments against self-insured employers. RCW 51.44.040(3); WAC 296-15-225. Second injury fund assessments will have to increase to account for post-pension medical treatment costs. WAC 296-15-225(1) ("[t]he second injury fund assessment is based on anticipated second injury fund costs.") The shift in responsibilities between the Department and self-insured employers, combined with the realistic expectation of increased second injury fund assessments, is a matter of substantial public interest meriting this Court's review.

VI. CONCLUSION

The Department requests the Court grant its petition for review. A self-insured employer is not relieved of its responsibility to pay for the costs of its worker's post-pension medical treatment under a proper reading of RCW 51.16.120(1). The Court of Appeals' conclusion to the contrary, while beneficial to Boeing, does not encourage worker safety, alters the administrative and financial responsibilities of all self-insured employers with respect to post-pension medical benefits, and will result in increased second injury fund assessments for all self-insured employers. The impact of the Court of Appeals' error presents an issue of substantial public interest meriting this Court's review.

SUBMITTED this 25th day of April, 2014.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE BOEING COMPANY, Respondent, v. PATRICIA DOSS, Respondent, STATE OF WASHINGTON, DEPARTMENT OF LABOR & INDUSTRIES, Appellant.	)	NO. 69759-5-I DIVISION ONE PUBLISHED OPINION FILED: March 31, 2014

LEACH, C.J. — The Department of Labor and Industries (Department) appeals a superior court judgment ordering the Department to pay from the second injury fund the costs of Patricia Doss's ongoing postpension medical treatment. The Department claims that the Boeing Company, as a self-insured employer, must pay these costs because Doss is permanently and totally disabled due to the combined effects of her preexisting disabling condition and chemical exposure at Boeing. Because the unambiguous language of RCW 51.16.120(1), consistent with the second injury fund's purpose, requires the Department to pay these costs, we affirm.

FACTS

In March 2000, Doss filed an application for workers' compensation benefits with the Department, alleging that chemical exposure while employed at Boeing permanently aggravated her preexisting symptomatic asthma. On June 17, 2008, the Department determined that Doss was permanently and totally disabled as of May 14, 2008, as a result of the combined effects of her industrial exposure and her preexisting condition. The Department awarded her a pension and also authorized ongoing postpension medical treatment for her asthma.[1]

The Department granted second injury fund relief to Boeing but also authorized ongoing medical treatment for Doss's asthma. On July 27, 2010, the Department, by letter, directed Boeing to pay the entire cost of this treatment. Boeing appealed this letter to the Board of Industrial Insurance Appeals (Board), which affirmed the Department. Boeing next appealed to the superior court.

The superior court reversed the Board's decision, concluding, "Ms. Doss' post pension treatment benefits are properly payable from the Second Injury Fund, and are not the responsibility of Boeing." The Department appeals.

[1] The Department ordered ongoing medical treatment with prescription medications under former RCW 51.36.010 (2007).

STANDARD OF REVIEW

When the Board reviews a case on stipulated facts, any remaining issues present questions of law, which we review de novo.[2]

ANALYSIS

This case presents a single issue: should the cost of Doss's postpension medical care be paid by Boeing or by the Department from the second injury fund. The Department claims, "[T]he 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." Boeing responds, "Both the language of the Second Injury Fund statute and the Department's own self-promulgated regulations show that Employers, when Second Injury Fund relief has been granted, are only responsible for the accident costs that resulted solely from the Claimants' industrial injury or disease." We agree with Boeing.

In Washington, every employer must secure the payment of workers' compensation by either "'[i]nsuring and keeping insured the payment of such benefits with the state fund'" or by qualifying as a self-insurer under chapter 51.14 RCW.[3] If an employer maintains industrial insurance through the state, the

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[2] Tobin v. Dep't of Labor & Indus., 145 Wn. App. 607, 613, 187 P.3d 780 (2008) (citing Tunstall v. Bergeson, 141 Wn.2d 201, 209-10, 5 P.3d 691 (2000)).

[3] Johnson v. Tradewell Stores, Inc., 95 Wn.2d 739, 742, 630 P.2d 441 (1981) (quoting RCW 51.14.010).

Department collects premiums from the employer to support medical aid and accident funds.[4] Injured workers receive medical benefits through the medical aid fund.[5] The accident fund provides benefits to workers who suffer injuries on the job or to the worker's family or dependents if the worker dies.[6] Self-insured employers pay benefits to injured workers directly.[7]

"Compensation for permanent total disability is paid as a monthly pension (or a lump sum) based on a percentage of the worker's wages."[8] RCW 51.44.070(1) requires,

> For every case resulting in death or permanent total disability the department shall transfer on its books from the accident fund of the proper class and/or appropriate account to the "reserve fund" a sum of money for that case equal to the estimated present cash value of the monthly payments provided for it, to be calculated upon the basis of an annuity covering the payments in this title provided to be made for the case. Such annuity values shall be 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.
>
> Similarly, a self-insurer in these circumstances shall pay into the reserve fund a sum of money computed in the same manner, and the disbursements therefrom shall be made as in other cases.[9]

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[4] WR Enters., Inc. v. Dep't of Labor & Indus., 147 Wn.2d 213, 216-17, 53 P.3d 504 (2002).

[5] WR Enters., 147 Wn.2d at 217 (citing former RCW 51.04.030 (1998)).

[6] WR Enters., 147 Wn.2d at 216-17 (citing ch. 51.32 RCW).

[7] Johnson, 95 Wn.2d at 742.

[8] McIndoe v. Dep't of Labor & Indus., 144 Wn.2d 252, 257, 26 P.3d 903 (2001) (citing former RCW 51.32.060 (1993)).

[9] Alternatively, a self-insured employer may file a bond or an assignment of an account or may purchase an annuity to cover the costs of the required pension benefits. RCW 51.44.070(2); see also RCW 51.44.140.

RCW 51.36.010(4) allows the supervisor of industrial insurance to authorize medical benefits for a pensioned worker "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." Here, the Department awarded Doss postpension medical treatment for her asthma.

Washington's workers' compensation system includes a special fund called the "second injury fund." This "fund encourages employers to hire and retain previously disabled workers, providing that the employer hiring the disabled worker will not be liable for a greater disability than what actually results from a later accident."[10] Additionally, "by recognizing that an employer is required only to bear the costs associated with the industrial injuries sustained by its employees, the fund encourages workplace safety and prevents placing unfair financial burdens on employers."[11] A rule that makes it easier for an employer to recover from the second injury fund will support the fund's purpose, while a rule that makes recovery too difficult will discourage an employer from hiring a previously disabled worker.[12]

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[10] Crown, Cork & Seal v. Smith, 171 Wn.2d 866, 873, 259 P.3d 151 (2011).

[11] Crown, Cork & Seal, 171 Wn.2d at 873 (citing Jussila v. Dep't of Labor & Indus., 59 Wn.2d 772, 778-79, 370 P.2d 582 (1962)).

[12] Puget Sound Energy, Inc. v. Lee, 149 Wn. App. 866, 880, 205 P.3d 979 (2009) (citing Jussila, 59 Wn.2d at 779).

RCW 51.44.040(1) provides that the second injury fund "shall be used only for the purpose of defraying charges against it as provided in RCW 51.16.120 [distribution of further accident cost] and 51.32.250 [job modification], as now or hereafter amended."[13] RCW 51.16.120(1) states,

> Whenever a worker has a previous bodily disability from any previous injury or disease, whether known or unknown to the employer, and shall suffer a further disability from injury or occupational disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof . . . a self-insured employer shall 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, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to such employer at the time of the further injury or disease and the total cost of the pension reserve shall be assessed against the second injury fund.

The Department asks us to follow a Board decision, In re Boudon,[14] where the Board directed Boeing to pay for the claimant's postpension medical treatment when the Department granted second injury fund relief. The Board reasoned,

> The provision of medical benefits after a pension award is discretionary to the director. It is not an anticipated cost that is built into the pension reserve. To pay the cost of the ongoing benefits from the pension reserve would deplete the funds placed in the reserve to cover the cost of the pension over the life of the worker. If the employer were a state fund employer, the Department would pay the cost of the ongoing medical benefits from the medical aid fund, not the supplemental pension reserve fund. The self-insured

[13] This case does not involve RCW 51.32.250.

[14] Nos. 98 17459 & 99 22359, 2000 WL 245825, at *5 (Wash. Bd. of Indus. Ins. Appeals Jan. 26, 2000).

> employer stands in the shoes of the Department with respect to payment of medical benefits and must likewise pay the cost of Ms. Boudon's ongoing psychiatric care.[15]

Boeing notes that it appealed this decision to the superior court, which reversed the Board and ordered the benefits paid from the second injury fund.[16]

We interpret a statute to give effect to the legislature's intent. Accordingly, we begin our review with the statute's plain language.[17] When a statute is unambiguous, we determine legislative intent from the statutory language alone.[18] Where an agency charged with administering and enforcing an ambiguous statute has interpreted it, we accord great weight to the agency's interpretation to determine legislative intent.[19] Absent ambiguity, however, we do not need the agency's expertise to construe the statute.[20] Additionally, we will not defer to an agency determination that conflicts with the statute.[21] "The courts retain the ultimate authority to interpret a statute."[22]

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[15] Boudon, 2000 WL 245825, at *5.

[16] Dep't of Labor & Indus. v. Boeing Co., No. 00-2-05612-5-KNT (King County Super. Ct., Wash. Dec. 15, 2012).

[17] Tiger Oil Corp. v. Dep't of Labor & Indus., 88 Wn. App. 925, 930, 946 P.2d 1235 (1997) (citing Lacey Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 53, 905 P.2d 338 (1995)).

[18] Tiger Oil, 88 Wn. App. at 930 (citing Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994); In re Eaton, 110 Wn.2d 892, 898, 757 P.2d 961 (1988)).

[19] Tiger Oil, 88 Wn. App. at 931 (citing City of Pasco v. Pub. Emp't Relations Comm'n, 119 Wn.2d 504, 507, 833 P.2d 381 (1992)).

[20] Tiger Oil, 88 Wn. App. at 931 (citing Pasco, 119 Wn.2d at 507).

[21] Tiger Oil, 88 Wn. App. at 931 (citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 815, 828 P.2d 549 (1992)).

[22] Tiger Oil, 88 Wn. App. at 930 (citing Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 325-26, 646 P.2d 113 (1982)).

The plain language of RCW 51.16.120(1) requires a self-insured employer to pay "only the accident cost which would have resulted solely from the further injury or disease, had there been no preexisting disability." The second injury fund pays "[t]he difference between the charge thus assessed to such employer at the time of the further injury or disease and the total cost of the pension reserve."[23] Thus, the statute requires Boeing to pay only the costs necessitated solely by Doss's industrial exposure and no more. The Department makes no claim that Doss's need for postpension medical care resulted solely from chemical exposure at Boeing. Thus, Boeing cannot be required to pay for this care.

Because the statutory language is unambiguous, we will not defer to the agency's interpretation in Boudon, which conflicts with the statute. Requiring Boeing to pay the cost of Doss's postpension medical treatment would also conflict with the second injury fund's purpose—to contain the future workers' compensation costs for employers who hire workers with preexisting disabling conditions to make those costs comparable to those for workers without preexisting disabling conditions. A contrary result would provide an economic disincentive to hiring previously disabled workers.

[23] RCW 51.16.120(1).

Boeing also asserts that requiring it to pay Doss's postpension medical treatment costs would constitute a double assessment on Boeing and a windfall to the Department. RCW 51.44.040(3) imposed on self-insured employers assessments for the second injury fund "pursuant to rules and regulations promulgated by the director to ensure that self-insurers shall pay to such fund in the proportion that the payments made from such fund on account of claims made against self-insurers bears to the total sum of payments from such fund." WAC 296-15-221(4)(a) requires each self-insured employer to submit to the Department

> [c]omplete and accurate quarterly reports summarizing worker hours and claim costs paid the previous quarter. . . . This report is the basis for determining the administrative, second injury fund, supplemental pension, asbestosis and insolvency trust assessments. . . .
>
> . . . .
>
> (ii) Claim costs include, but are not limited to:
>
> (A) Time loss compensation. Include the amount of time loss the worker would have been entitled to if kept on full salary.
>
> (B) Permanent partial disability (PPD) awards.
>
> (C) Medical bills.
>
> (D) Prescriptions.
>
> (E) Medical appliances.
>
> (F) Independent medical examinations and/or consultations.
>
> (G) Loss of earning power.
>
> (H) Travel expenses for treatment or rehabilitation.
>
> (I) Vocational rehabilitation expenses.
>
> (J) Penalties paid to injured workers.
>
> (K) Interest on board orders.

The Department bases a self-insured employer's assessments for the second injury fund upon the employer's total claim costs. Thus, we agree with

Boeing that it pays assessments for the second injury fund based, in part, on treatment costs. Including treatment costs as part of the total claim costs considered for the self-insured employer's assessments indicates that the legislature intended for the Department to pay from the second injury fund the costs of postpension medical treatment after it grants second injury fund relief.

All self-insured employers pay for second injury fund claims that involve individual self-insured employers. This spreads the risk among all of these self-insured employers. This does not affect assessments imposed on employers who insure the payment of workers' compensation benefits with the state fund.

Further, as the Department notes, when the Department orders postpension treatment in a second injury state fund claim, the cost of this treatment "is spread to all state fund employers and employees." The state fund employer pays for actual and anticipated costs for permitted claims, including pensions. The state fund employer's experience rating is based upon these costs.

When a state fund employer's injured worker becomes totally disabled because of the combined effects of a preexisting disabling condition and an industrially related condition, the state fund employer is entitled to have the pension paid from the second injury fund without any charges to the employer's account and without any effect on the employer's experience rating. The

Department's proposed result would impose a greater financial burden on self-insured employers. "We do not interpret statutes to reach absurd and fundamentally unjust results."[24] Therefore, because the Department has presented no authority to support disparate financial treatment of self-insured employers, we reject its proposed statutory interpretation.

CONCLUSION

Because the unambiguous language of RCW 51.16.120(1), consistent with the purpose of the second injury fund, requires the Department, rather than the self-insured employer, to pay the costs of a disabled employee's ongoing postpension medical treatment and a self-insured employer should not bear a financial burden different from a state fund employer, we affirm.

Leach, C.J.

WE CONCUR:

[24] Flanigan v. Dep't of Labor & Indus., 123 Wn.2d 418, 426, 869 P.2d 14 (1994).

NO. _____
(Court of Appeals No. 69759-5-I)

SUPREME COURT OF THE STATE OF WASHINGTON

BOEING CO., Respondent, v. PATRICIA DOSS Respondent, DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON and EASTSIDE GLASS & SEALANTS, Appellant.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Petition for Review and this Certificate of Service in the below described manner.

Via ABC Legal Messenger to:

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DATED this 25th day of April, 2014.

Robin E Haney

ROBIN E. HANEY
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