NO. 44508-5-II

COURT OF APPEALS,
DIVISION II

IN THE STATE OF WASHINGTON

CAROLYN A. GIGER, *APPELLANT/PLAINTIFF*

v.

DEPARTMENT OF LABOR AND INDUSTRIES, *RESPONDENT/DEFENDANT.*

APPELLANT'S REPLY BRIEF

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Argument

The Department of Labor and Industries argues that there is no set of circumstances by which an injured worker can ever receive time loss benefits, and a pension, on an aggravation claim once the worker has been found employable by the Department and his claim closed. In this case, Mr. Giger was found employable and his claim closed on November 8, 1990. His appeal was denied on September 4, 1992. He suffered two disabling motor vehicle accidents on November 12, 1992, and February 9, 1993. By December 1, 1993, his industrial injury had worsened and became disabling, and on February 14, 1994, the Department reopened his claim. In addition to the issue as to whether Mr. Giger retired on April 1, 1988, as a proximate cause of the industrial injury of December 24, 1985, there is an issue as to whether under the circumstances it was reasonable that Mr. Giger not attempt to return to work prior to February 14, 1994. These are questions of fact which should be decided by a jury.

Commencing at page 5 under Summary of the Argument, the Brief of Respondent equates wage replacement benefits with time loss and pension benefits. There is no mention of wage replacement benefits under RCW 51.32.060, permanent total disability (pension), and 51.32.090, temporary

total disability (time loss benefits). The term wage replacement benefits was derived from *Kaiser Aluminum v. Overdorf*, 57 Wn. App. 291, 788 P.2d 8 (1990), relying on RCW 51.12.010 Declaration of Policy which provides:

> This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

This is probably the first time that the liberal construction of the Industrial Insurance Act in favor of the injured worker has ever been construed against the injured worker. The stated purpose of reducing to a minimum the suffering and economic loss should not be construed as wage replacement. Time loss or pension benefits pursuant to 51.32.060 and 51.32.090 only provide for payment of a base rate of 60% of the injured workers gross wage at time of injury.

In *Kaiser Aluminum v. Overdorf*, 57 Wn. App. 291, 293 788 P.2d 8 (1990), Kaiser Aluminum contended on appeal that the superior court erred in determining that time loss benefits were precluded given Mr. Overdorf's collection of retirement benefits during the same period. There, the court concluded that the allowance of time loss benefits under the present factual situation to be contrary to legislative intent, construing the intent of the statute against the injured worker despite RCW 51.12.010. *Overdorf*, 57

Wn. App. at 297. Then, *Weyerhauser Co. v. Farr,* 70 Wn. App. 759, 855 P.2d 711 (1993) essentially followed suit and decided that *Overdorf* applied to pension benefits, as well as time loss benefits.

RCW 51.32.060, Permanent Total Disability, was amended in 1986, and a new paragraph 6 added, which provides that on new or reopened claims, if at the time of filing or reopening, the worker is voluntarily retired and no longer attached to the workforce, benefits shall not be paid under this section. The same law would apply under RCW 51.32.090(8), Temporary Total Disability, also a new paragraph. In 1986, WAC 296-14-100 became law, which was amended in 1999, to restate, but not change the meaning. Under paragraph (1), a worker is considered voluntarily retired when (a) not receiving income, salary or wages from gainful employment, and (b) there has not been a bonafide attempt to return to work after retirement. But, pursuant to paragraph (2), a worker is not voluntarily retired when the industrial injury is a proximate cause of the retirement. Paragraph (2) qualifies and limits the effect of paragraph (1).

Since the changes in the statute apply to reopened claims, as well as new claims, RCW 51.32.060(6), RCW 51.32.090(8), and WAC 296-14-100 apply here, and it does not matter what the law was as of the date of injury on December 24, 1985. When interpreting statutes, the court begins their

review with the statutory language itself. If the statute's meaning is plain on its face, the court applies that meaning. Only if the provision remains susceptible to more than one reasonable interpretation, does the court employ tools of statutory construction to discern its meaning. When interpreting the Industrial Insurance Act, all doubts are resolved in favor of the injured worker. *Glacier NW Inc., v. Walker*, 151 Wn. App. 389, 212 P.3d 587 (2009).

The question remains was the industrial injury of December 24, 1985, a proximate cause of Mr. Giger's retirement on April 1, 1988, from the Department of Corrections. The prior determination of the Department of Labor and Industries on November 8, 1990, that Mr. Giger was able to work is *res judicata* as of that date, but is not *res judicata* as to his ability to work on February 14, 1990. *White v. Dept. of Labor & Indus.*, 48 Wn.2d. 413, 293 P.2d 764(1956). In the appeal of the Department order of November 8, 1990, to the Board of Industrial Insurance Appeals and Superior Court, the Department did not raise the issue of Mr. Giger's retirement and continued to pay his time loss benefits after his retirement through October 15, 1990.

This case is distinguishable from *Overdorf* and *Farr*, as well as *Energy NW v. Hartje,* 148 Wn. App. 454, 199 P3d 1043 (2009). *Overdorf* and *Farr* applied the law prior to the statutory amendment in 1986, but

Hartje applied the law after the effective date. Ms. Hartje argued that she was not voluntarily retired because she was not able to return to the workforce due to her industrial injury. Ms. Hartje failed to show that her industrial injury was a proximate cause of her retirement. Therefore, the prior decision that she was able to work was *res judicata*. In this case that was November 8, 1990, but that does not answer the question as to whether Mr. Giger was able to return to work as of February 14, 1994, and why he was not able to return to work after November 8, 1990.

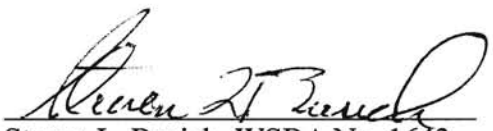
If Mr. Giger had attempted to return to work after November 8, 1990, but before September 4, 1992, when his appeals were exhausted, that may not have prevented him from being found permanently totally disabled, but would have prevented him from being found temporarily totally disabled during that period of time. It does make a difference whether Mr. Giger's condition worsened after claim closure because of the treatment he received prior to claim closure. Because his fusion at L4-5 failed, his claim was reopened, and that distinguishes this case from *Hartje,* 148 Wn. App. at 468. The Consequential Condition Doctrine does allow for recovery when the worker's present condition is a consequence of the previous treatment, *Dept. of Labor & Indus., v. Shirley,* 171 Wn. App. 870, 288 P3d. 390 (2012).

The Department of Labor and Industries could have maintained in

the appeal of the November 8, 1990, order that Mr. Giger had voluntarily retired on April 1, 1988, but failed to do so. The Department could have maintained that Mr. Giger had retired in the appeal of the Department order of January 25, 1995, that this was an over 7 year claim, but failed to do so. The Department failed to even raise the issue until June 8, 2010, when all other arguments failed to deny Mr. Giger time loss and pension benefits.

Conclusion

The Order, Judgment and Decree dated January 23, 2013, granting summary judgment in favor of Department of Labor and Industries should be reversed and remanded to Superior Court for trial on the issues of fact remaining.



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DIVISION II

CAROLYN A. GIGER, Appellant/Plaintiff, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent/Defendant(s).	No. 44508-5-II PROOF OF SERVICE APPELLANT'S REPLY BRIEF

The undersigned states that on August 26, 2013, I served by United States Mail, with proper postage prepaid, Appellant's Reply Brief, addressed 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: August 26, 2013.

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