NO. 44508-5-II

COURT OF APPEALS,
DIVISION II

91049-9

IN THE STATE OF WASHINGTON

CAROLYN A. GIGER, *PETITIONER/APPELLANT/PLAINTIFF*

v.

DEPARTMENT OF LABOR AND INDUSTRIES,
RESPONDENT/DEFENDANT.

PETITION FOR REVIEW TO THE SUPREME COURT

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No. 1. When the Worker Compensation Act, Title 51, specifically RCW 51.32.060, providing for permanent total disability, or a pension, was amended in 1986 to add a new paragraph (6) as follows:

> In the case of new or reopened claims, if the supervisor of industrial insurance determines that, at the time of filing or reopening, the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section. See Appendix B

and at the name time RCW 51.32.090, providing for temporary total disability, or time loss benefits, was amended to add a new paragraph (8) as follows:

> If the supervisor of industrial insurance determines the worker is voluntarily retired and no longer attached to the workforce, benefits will not be paid under this section. See Appendix C

Did the legislative distinguish between workers who were involuntarily retired from the workforce, verses those who were voluntarily retired from the workforce?

In the same year Washington Administrative Code 296-14-100 was enacted distinguishing workers who were involuntarily retired from the workforce, as supposed to those who were voluntarily retired from the workforce, as follows:

> The claimants of new or reopened claims will not be deemed voluntarily retired if the injury or occupational disease was a proximate cause of the decision to retire and sever the attachment to the workforce. See Appendix D

No. 2. If the injury or occupational disease is found by a trier of fact to be a proximate cause of the worker's retirement and his retirement involuntary, should benefits be paid under these sections?

No. 3. If an involuntarily retired worker is no longer attached to the workforce, does that preclude him from receiving time loss and pension benefits, or are there circumstances under which an injured worker may receive these benefits on a reopened claim for aggravation?

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Statement of the Case

Robert Giger, born April 20, 1936, commenced working for the Department of Corrections, State of Washington, on August 17, 1957. In 1959, Mr. Giger was working as a correction office at the state penitentiary in Walla Walla, when he was assaulted by an inmate and suffered a low back injury. He

filed a worker compensation claim, and in January 1960, underwent a laminectomy and fusion at L5-S1. He then returned to work for the Department of Corrections in January 1961. The first year or two after the injury his low back bothered him periodically, but as time went on his condition improved. (Certified Appeal Board Record, R. Giger - November 5, 2010, Direct, page 8, line 23; page 9, lines 14, 16, 20 and 26; page 10, lines 8, 10 and 18; and Cross, page 69, lines 3, 5 and 9).

Then on July 1, 1978, Mr. Giger was transferred to Larch Corrections Center, a minimum security facility in Clark County, Washington, as Superintendent. On Christmas Eve, 1985, Mr. Giger received a call at home that two inmates had escaped from the Correction Center. Mr. Giger drove to a remote location in Clark County, where the inmates were likely to head, to set up a post. As he stepped from his service vehicle, he slipped on compacted snow and ice, twisted his back, and fell to the ground. Mr. Giger was off work for four to six weeks, went back to work full time, continued to have problems with his low back, and last worked in late April 1987. (CABR, R. Giger – Direct, page 9, lines 6, 8, 10 and 12; page 15, line 26; page 16, line 3; and page 18, line 14).

On March 1, 1988, Mr. Giger had a second low back surgery, consisting of a Steffee plate fusion at L4-5 with pedicle screws. Mr. Giger could not continue working at the Department of Corrections with his low back condition,

and retired on April 1, 1988, with over 30 years of service. At the time of his retirement, Mr. Giger also suffered from high blood pressure, or hypertension, which had been first diagnosed in 1984. Prior to December 24, 1985, Mr. Giger's hypertension was controlled by medication, but, after the injury with the pain he was experiencing, his blood pressure skyrocketed. Mr. Giger had also been diagnosed with angina, and the stress of the industrial injury and managing his pain aggravated his angina. (CABR, R. Giger - Direct, page 17, lines 5, 8, 19, 23 and 25; page 18, lines 14, 17 and 24; page 19, line 14, page 21, line 7; page 22, lines 14, 16 and 18; page 23, lines 17 and 19; and page 24, line 5).

After Mr. Giger retired from the Department of Corrections, the Department of Labor and Industries assigned a vocational counselor, Connie Stewart, who at the time was employed by the Department, to determine whether Mr. Giger was employable. Ms. Stewart knew that Mr. Giger had retired on April 1, 1988, and learned that there were no jobs available to Mr. Giger at the Department of Corrections. Ms. Stewart learned that Mr. Giger wanted to pursue a career in real estate to supplement his retirement income, which was $2,800 per month. As of January 4, 1989, Ms. Stewart was also aware that Mr. Giger's hypertension prevented him from returning to a high stress or pressure job. Ms. Stewart found that Mr. Giger had transferable skills to do other work and be gainfully employed should he choose to do that.

(CABR, Stewart - January 10, 2011, Direct, page 4, line 24; page 6, line 20; page 8, line 14; page 16, line 25; page 17, line 21; page 20, line 12; and Cross page 28, line 18, page 32, line 12).

Though the Department of Labor and Industries knew that Mr. Giger had retired on April 1, 1988, they continued to pay him time loss benefits as a temporarily totally disabled worker through October 15, 1990. When the Department of Labor and Industries then closed his claim on November 8, 1990, and found Mr. Giger able to work, Mr. Giger appealed to the Board of Industrial Insurance Appeals, and then to Superior Court for Clark County. The appeal to Superior Court was decided by jury verdict against Mr. Giger, and on September 4, 1992, the Court affirmed the decision of the Board. (CABR, Page 90).

Then on November 12, 1992, Mr. Giger was involved in a motor vehicle accident, when his car was struck from the rear by a drunk driver while stopped for a traffic light. Mr. Giger received a compression fracture to his neck and treated with Dr. Bruce Bell, a neurologist, in Vancouver, Washington. Again on February 9, 1993, Mr. Giger's vehicle was struck from the rear by another vehicle when traffic slowed on a freeway on-ramp. The impact aggravated Mr. Giger's compression fracture and he continued treatment with Dr. Bell. (CABR, pages 89-90; R. Giger - Direct, page 28, line 15; page 29, lines 3, 7 and 14; and page 30, line 12).

As indicated in the Motion for Reconsideration of the unpublished opinion, the Court of Appeals stated that the motor vehicle accidents in 1992 and 1993 was the reason the Department of Labor and Industries reopened his claim. See the unpublished opinion of the Court of Appeals, Division II, Facts, page 2, paragraph 3. An aggravation is a natural progression of a preexisting condition caused by an industrial injury as opposed to a new injury. *McDougal v. Dept. of Labor and Indus.*, 64 Wn. 2d640, 393 P.2d 631 (1964). The significance of the motor vehicle accidents in 1992 and 1993 was to show why Mr. Giger could not have attempted to return to the workforce up until his industrial injury related condition became aggravated as of December 1, 1993.

On December 8, 1993, Dr. Bell saw Mr. Giger back. He had been improving from the injuries he received in the motor vehicle accidents, and about a week prior to the visit, he had an aggravation of his low back condition from the industrial injury of December 24, 1985. His low back had locked up, and he had hardly any movement in his back. He had pain running down both legs. On physical examination, Dr. Bell found a significant amount of spasm in his low back, severe scoliosis bending to the left, and a positive straight leg raise of 10 degrees bilaterally. Dr. Bell saw him back on December 29, 1993, and January 12, 1994, and Mr. Giger's low back symptoms were getting worse. On February 9, 1994, when Dr. Bell saw Mr. Giger again, an application to reopen his claim for aggravation was completed, and the reopening application was

received by the Department of Labor and Industries on February 14, 1994. (CABR, Dr. Bell – November 30, 2010, Direct, page 63, lines 10, 12, 16, 23 and 25; page 64, lines 14 and 16; page 65, lines 21 and 23; and page 67, lines 12 and 17).

On January 25, 1995, Mr. Giger's claim was reopened by the Department of Labor and Industries for medical treatment only on the basis that the aggravation application was not received within seven years of initial claim closure. That issue was eventually decided in Superior Court for Clark County by summary judgment on June 26, 2009, favorable to Mr. Giger, after a long and protracted series of protests and appeals, and he could receive benefits other than treatment effective February 14, 1994. (CABR, pages 90-94).

While the claim was reopened for treatment, Mr. Giger had the Steffee plates and pedicle screws removed by Dr. Michael Markham, a neurosurgeon, on March 17, 1995. The Steffee plates that had been used in the fusion at L4-5 on March 1, 1988, had come apart, and x-rays showed that a nut on one of the pedicle screws did not have a lock nut on it. The nut had come off a pedicle screw causing the Steffee plate to move up and down. Mr. Giger then had improvement for six months before his condition worsened again, and Dr. Markham had x-rays taken that determined that the fusion itself had come apart. Mr. Giger then saw Dr. Timothy Keenan, a spine surgeon, who on November 5, 1997, refused the L4-5 level and extended the rods to L3-4,

resulting now in a three level fusion. Following the third fusion, Mr. Giger has had a slow and difficult recovery, and has had 40-50 epidural steroid injections over the years. (CABR, R. Giger - Direct, page 32, line 1; page 34, lines 8, 10, 12 and 18; page 36, lines 7 and 21; page 37, line 1; and page 38, line 2).

Timothy Keenan, MD, a Board certified orthopedist with a fellowship in spine surgery, reviewed the operative report of Michael Markham, MD, dated March 17, 1995. Dr. Markham was now deceased. Reviewing the CT scan of November 20, 1996, Dr. Keenan found that the facet joints were overgrown and not completely fused. The condition is called psuedoarthritis, and was related to the 1988 surgery not healing completely. (CABR, Dr. Keenan - November 16, 2010, Direct, page 5, line 17; page 7, line 10; page 11, line 10; page 13, lines 4, 9, 13 and 15; page 14, line 9; page 15, line 3; and page 16, line 6).

All of the doctors who testified on behalf of Mr. Giger, Bruce Bell, MD, John Kauser, MD, Timothy Keenan, MD, and Maury Hafermann, MD, established that Mr. Giger was temporarily totally disabled as proximately caused by the industrial injury of December 24, 1985, from February 14, 1994, through June 9, 2010. Their testimony also established that at least by June 25, 2010, Mr. Giger was permanently totally disabled. (CABR, Dr. Bell - November 30, 2010, Direct, page 77, lines 12 and 16; and page 78, line 7; Dr. Kaiser - November 30, 2010, Direct, page 35, line 16; and page 36, line 23; Dr. Keenan - November 16, 2010, Direct, page 29, line 9; and Dr. Hafermann -

November 5, 2010, Direct, page 122, lines 15 and 19; and page 123, line 8). What is in dispute is, since Mr. Giger did not attempt to return to work after he was found employable as of November 8, 1990, whether he should be denied time loss and pension benefits on his reopening application.

Mr. Giger appealed to the Board of Industrial Insurance Appeals the order of the Department of Labor and Industries dated June 25, 2010, affirming the orders dated June 8, 2010, and June 9, 2010. The June 8, 2010, Department order denied time loss benefits from February 14, 1994, through June 4, 2010, on the basis that he voluntarily retired from employment on April 1, 1988. The June 9, 2010, Department order closed the claim for treatment without awarding pension benefits. (CABR, pages 77-79 and page 95).

Mr. Giger's appeal to the Board proceeded to a full evidentiary hearing before an Industrial Appeals Judge. The issue presented for hearing was whether the December 24, 1985, industrial injury was a proximate cause of Mr. Giger's retirement from the Department of Corrections on April 1, 1988. On September 19, 2011, the Industrial Appeals Judge issued his 34 page Proposed Decision and Order deciding the issue favorable to Mr. Giger. The Proposed Decision and Order awarded temporary total disability from February 14, 1994, and permanent total disability as of June 25, 2010. (CABR, pages 41-74).

The Department of Labor and Industries then petitioned for review to the Board and Mr. Giger responded. (CABR, pages 41-74). On January 30, 2012, two of the three Board members, the third not participating, reversed the Industrial Appeals Judge. The Decision and Order of the Board determined that since Mr. Giger had not attempted to return to work following the order of November 8, 1990, that he could not recover further time loss or pension benefits. Since he had not attempted to return to work before filing his reopening application on February 14, 1994, he was foreclosed from further benefits. (CABR, pages 2-35).

Mr. Giger then appealed the Board's Decision and Order to Superior Court for Clark County. The Department filed a Motion for Summary Judgment to which Mr. Giger responded. The motion was argued to the Court on September 14, 2012. Robert Giger died on December 4, 2012, and on January 15, 2013, an order was entered substituting Carolyn Giger as the plaintiff in the action. On January 23, 2013, an Order, Judgment and Decree was entered granting summary judgment for the Department affirming the Board's decision. On February 7, 2013, Ms. Giger filed her appeal to the Court of Appeals, Division II. (Clerk's Papers Nos. 2, 20, 38 and 61).

On September 3, 2014, the Court of Appeals, Division 11, filed its unpublished opinion concluding that the superior court did not error in granting summary judgment, and that Robert Giger had voluntarily retired as a matter of

law prior to the aggravation of his industrial injury and was not entitled to time loss benefits or a pension, which the court termed wage replacement benefits. Carolyn Giger then filed a Motion for Reconsideration on September 16, 2014, which was denied on October 24, 2014. See Appendix E and F. Ms. Giger maintains that her husband did not voluntarily retire from the Department of Corrections, and that as the result of the treatment he had for the industrial injury, ie the Steffee Plate Fusion came apart and had to be refused, prevented him for attempting to return to the work force.

Argument

A. Summary Judgment

Kaiser Aluminum v. Overdorf, 57 Wn. App. 291, 295, 788 P.2d8 (1990), and *Weyerhaeuser Co. v. Farr, 70* Wn. App. 759, 763, 885 P.2d 711 (1993), held that the law of voluntary retirement was essentially the same prior to the enactment of RCW 51.32.060 (6) and RCW 51.32.090 (8). If an injured worker has previously voluntarily retired from the workforce prior to the aggravation of an industrial injury or occupational disease, he or she is not entitled to temporary total disability or permanent total disability. Ms. Giger does not disagree, but the issue remains whether Mr. Giger voluntarily retired from the workforce, or did he retire as a proximate cause of the industrial injury, which is a question of fact.

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. See Appendix A

This is probably the first time that the liberal construction of the Industrial Insurance Act in favor of the injured worker has 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 RCW 51.32.060 and RCW 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 payable 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). See Appendices A through E.

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).

In *Energy NW. v. Hartje*, 148 Wn. App. 454, 468, 199 P.3d 1043 (2009), Ms. Hartje argued that she was not voluntarily retired because she was not able to return to the workforce due to her industrial injury. Division III at page 469 held that Ms. Hartje must show that her retirement would not have resulted if her industrial injury had not occurred, and she failed to do so. But then in the next paragraph, Division III states that because it was determined that Ms. Hartje was capable of gainful employment when her case was previously closed, her industrial injury was not a proximate cause of her failure to return to the workforce. This is what Division III calls the law of the case doctrine, that is somehow different than *res judicata*, which was earlier denied application.

Essentially, the law of the case doctrine is the same as *res judicata*. *White v. Dept. of Labor & Indus.*, 48 Wn.2d 413, 414, 293 P.2d 764 (1956), known as the *Jesse White* decision, holds that an order of the Department of Labor and Industries closing the claim of an injured worker is *res judicata* as to the extent of the injury at that time, but is not *res judicata* as to a subsequent period of aggravation. *Jesse White* has been applied to significant decisions of the Board of Industrial Insurance Appeals. *In re Leona McClenaghan*, BIIA Dec., 24, 922 (1967). *In re Mary Burbank*, BIIA Dec., 30, 673 (1969), and

In re Lisa Smith, BIIA Dec., 86, 1152 (1988). Here, the order of the Department of Labor and Industries dated November 8, 1990, that awarded permanent partial disability, time loss as paid, and closed the claim, was not *res judicata* as to the period of aggravation commencing February 14, 1994.

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.

A question of fact also remains as to whether it was reasonable that Mr. Giger not attempt to return to work between September 4, 1992, and February 14, 1994. Mr. Giger was involved in the motor vehicle accident of November 12, 1992, in which he received a compression fracture of the neck, which was aggravated by the second motor vehicle accident on February 9, 1993. Then a week before December 8, 1993, when he again saw Dr. Bell, he had aggravated his low back condition from the industrial injury of

December 24, 1985, when his back locked up and he could hardly move. His accepted low back condition deteriorated from there. On March 17, 1995, Dr. Michael Markham removed the Steffee plates and pedicle screws from the March 1, 1988, fusion at L4-5. At that time it was discovered that one of the pedicle screws did not have a lock nut on it, allowing the nut to come off the pedicle screw and the Steffee plate to move up and down. Then the CT scan of November 20, 1996, revealed that the fusion itself had failed, and on November 5, 1997, Dr. Timothy Keenan refused L4-5 along with L3-4.

Since the fusion for the industrial injury had failed, there is a completely different light cast on this case. The Board of Industrial Insurance Appeals determines which of their decisions are significant and makes them available to the public pursuant to RCW 51.52.160. Those decisions are nonbinding, but persuasive authority on appeals. While the Board interpretation of the Industrial Insurance Act is not binding on the appellate court, they are entitled to great difference. *Dept. of Labor & Indus., v. Shirley*, 171 Wn. App. 870, 887, 288 P.3d 390 (2012), *O'Keefe v. Dept. of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005).

Well recognized in Washington is the *consequential conditions doctrine*. Any conditions that develop from the industrial injury are covered as part of the claim. *In re Arvid Anderson*, BIIA Dec., 65, 170 (1986) held that conditions resulting from the industrial injury are considered part and parcel of

the industrial injury itself. Where a cardiac arrhythmia was caused by the stress of surgery as part of the claim, therefore the heart arrhythmia was attributable to the industrial injury. *In re Iris Vandorn*, BIIA Dec., 02 11466 (2003) held that a new injury suffered when the worker was involved in an auto accident on the way back from a required appointment with a vocational counselor as part of the claim is covered. The new injury is related to the original injury, and is a compensable consequence of the original industrial injury.

The Industrial Insurance Act is intended to grant the worker a sure and certain relief regardless of the fault or due care of either the employer or the employee. To this end, the Act is remedial in nature, and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. *Dept. of Labor & Indus., v. Shirley*, 171 Wn. App. at page 879, *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). Liberally construing the Act in favor of the worker, it is at least a question of fact as to whether it was reasonable that Mr. Giger not have attempted to return to work between September 4, 1992, and February 14, 1994, less than an 18 month period of time.

In this case Mr. Giger was receiving retirement benefits following his retirement from the Department of Corrections as of April 1, 1988, in the sum of $2,800 a month. Had the legislature intended to preclude time loss and pension benefits from injured workers receiving retirement benefits, or reduce those

benefits by the amount of retirement, they could have done so. Pursuant to RCW 51.32.220, injured workers receiving Social Security retirement or disability payments have their time loss and pension benefits reduced accordingly. Since the legislature has not reduced benefits in the instance of retirement, the legal presumption is that they did not intend to do so. *Dept. of Labor & Indus., v. Shirley*, 171 Wn. App. at Page 883. *Harris v. Dept. of Labor & Indus.*, 120 Wn.2d 461, 472, 843 P.2d 1056 (1993) declined to read into the Act that which was absent.

The Department of Labor and Industries argues here that the decision of the Department on November 8, 1990, that was upheld before the Board and in Superior Court that Mr. Giger was able to work, breaks the chain of his retirement on April 1, 1988, and he cannot now contend that his retirement was caused by the industrial injury. Knowing that Mr. Giger had retired when he did and was receiving retirement benefits, the Department continued to pay him time loss benefits through October 15, 1990. If anyone should be estopped to assert that claimant voluntarily retired from the Department of Corrections, or waived their right, it should be the Department of Labor and Industries.

In *Dept. of Labor & Indus. v. Shirley*, 171 Wn. App. at page 873, the Department argued that Mr. Shirley's simultaneous ingestion of alcohol and prescription medication constituted an intervening activity that broke the chain of causation between the industrial injury and his death, thereby precluding survivor benefits to his spouse. As provided in Washington Pattern Jury

Instructions, Civil 155.06, the Washington Industrial Insurance Act permits multiple proximate cause. The industrial injury need only be a proximate cause of death, not the proximate cause. *Dept. of Labor & Indus., v. Shirley*, 171 Wn. App., at page 885, *Wendt v. Dept. of Labor & Indus.*, 18 Wn. App. 674, 676, 571 P.2d 229 (1977).

In light of the Act's no fault policy and its mandate that worker compensation law be construed in the worker's favor, the consumption of alcohol with medication was not a supervening cause, and did not break the chain of causation between the industrial injury and Mr. Shirley's death. *Dept. of Labor & Indus. v.Shirley*, 171 Wn. App. at page 892. The fact that *Shirley* involved survivor benefits as referenced in the unpublished opinion at page 11, should not affect the application of the *consequential condition doctrine* here.

To hold that the later determination that Mr. Giger was able to work breaks the chain of causation between the industrial injury and his retirement, would refute *White v. Dept. of Labor & Indus.*, 48 Wn.2d at page 414. The determination that Mr. Giger was able to work as of November 8, 1990, is only *res judicata* as to his condition at that time, and is not *res judicata* as to any subsequent period of aggravation. To hold otherwise would deny an injured worker their right to ever reopen his claim for aggravation and receive time loss and pension benefits regardless of the circumstances. In this case the treatment that Mr. Giger had for the industrial injury, namely the failed fusion, rendered

him unable to work, or attempt to return to work, after his claim was closed, and caused him to be temporarily and permanently totally disabled.

B. Reasonable Attorney Fees

If the Supreme Court were to grant judgment as a matter of law to Ms. Giger, the petitioner, she would be entitled to reasonable attorney fees pursuant to RCW 51.52.130. But, if the Supreme Court reverses the Court of Appeals and remands the case to Superior Court for trial on the issues remaining, the accident fund would not be affected, and she would have to prevail in Superior Court to be awarded reasonable attorney fees in Superior Court, Court of Appeals, and Supreme Court.

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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chapter 18.27 RCW or an electrical contractor license pursuant to chapter 19.28 RCW. [2008 c 102 § 5.]

Conflict with federal requirements—Severability—2008 c 102: See notes following RCW 51.08.070.

51.08.185 "Employee." "Employee" shall have the same meaning as "worker" when the context would so indicate, and shall include all officers of the state, state agencies, counties, municipal corporations, or other public corporations, or political subdivisions. [1977 ex.s. c 350 § 16; 1972 ex.s. c 43 § 4.]

51.08.195 "Employer" and "worker"—Additional exception. As an exception to the definition of "employer" under RCW 51.08.070 and the definition of "worker" under RCW 51.08.180, services performed by an individual for remuneration shall not constitute employment subject to this title if it is shown that:

(1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and

(2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and

(3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and

(4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and

(5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and

(6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting. [2008 c 102 § 4; 1991 c 246 § 1.]

Conflict with federal requirements—Severability—2008 c 102: See notes following RCW 51.08.070.

Additional notes found at www.leg.wa.gov

51.08.900 Construction—Title applicable to state registered domestic partnerships—2009 c 521. For the purposes of this title, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships as well as to marital relationships and married persons, and references to dissolution of marriage shall apply equally to state registered domestic partnerships that have been terminated, dissolved, or invalidated, to the extent that such interpretation does not conflict with federal law. Where necessary to implement chapter 521, Laws of 2009, gender-specific terms such as husband and wife used in any statute, rule, or other law shall be construed to be gender neutral, and applicable to individuals in state registered domestic partnerships. [2009 c 521 § 138.]

Chapter 51.12 RCW
EMPLOYMENTS AND OCCUPATIONS COVERED

Sections

Ferry system employees: RCW 47.64.070.

Health and safety of underground workers: Chapter 49.24 RCW.

51.12.010 Employments included—Declaration of policy. There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

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. [1972 ex.s. c 43 § 6; 1971 ex.s. c 289 § 2; 1961 c 23 § 51.12.010. Prior: 1959 c 55 § 1; 1955 c 74 § 2; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1923 c 128 § 1, part; RRS § 7674a, part.]

51.12.020 Employments excluded. The following are the only employments which shall not be included within the mandatory coverage of this title:

have the same force and effect as a department order that has become final under RCW 51.52.050.

(11) If within two years of claim closure under subsections (7) through (9) of this section, the department determines that the self-insurer has made payment of benefits because of clerical error, mistake of identity, or innocent misrepresentation or the department discovers a violation of the conditions of claim closure, the department may require the self-insurer to correct the benefits paid or payable. This subsection (11) does not limit in any way the application of RCW 51.32.240.

(12) For the purposes of this section, "comparable wages and benefits" means wages and benefits that are at least ninety-five percent of the wages and benefits received by the worker at the time of injury. [2004 c 65 § 8; 1997 c 416 § 1; 1994 c 97 § 1; 1988 c 161 § 13; 1986 c 55 § 1; 1981 c 326 § 1; 1977 ex.s. c 350 § 43; 1971 ex.s. c 289 § 46.]

Report to legislature—Effective date—Severability—2004 c 65: See notes following RCW 51.04.030.

Additional notes found at www.leg.wa.gov

51.32.060 Permanent total disability compensation—Personal attendant. (1) When 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:

(a) If married at the time of injury, sixty-five percent of his or her wages.

(b) If married with one child at the time of injury, sixty-seven percent of his or her wages.

(c) If married with two children at the time of injury, sixty-nine percent of his or her wages.

(d) If married with three children at the time of injury, seventy-one percent of his or her wages.

(e) If married with four children at the time of injury, seventy-three percent of his or her wages.

(f) If married with five or more children at the time of injury, seventy-five percent of his or her wages.

(g) If unmarried at the time of the injury, sixty percent of his or her wages.

(h) If unmarried with one child at the time of injury, sixty-two percent of his or her wages.

(i) If unmarried with two children at the time of injury, sixty-four percent of his or her wages.

(j) If unmarried with three children at the time of injury, sixty-six percent of his or her wages.

(k) If unmarried with four children at the time of injury, sixty-eight percent of his or her wages.

(l) If unmarried with five or more children at the time of injury, seventy percent of his or her wages.

(2) For any period of time where both husband and wife are entitled to compensation as temporarily or totally disabled workers, only that spouse having the higher wages of the two shall be entitled to claim their child or children for compensation purposes.

(3) In case of permanent total disability, if the character of the injury is such as to render the worker so physically helpless as to require the hiring of the services of an attendant, the department shall make monthly payments to such attendant for such services as long as such requirement continues, but such payments shall not obtain or be operative while the worker is receiving care under or pursuant to the provisions of chapter 51.36 RCW and RCW 51.04.105.

(4) Should any further accident result in the permanent total disability of an injured worker, he or she shall receive the pension to which he or she would be entitled, notwithstanding the payment of a lump sum for his or her prior injury.

(5) In no event shall the monthly payments provided in this section:

(a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if a worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (5)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

The limitations under this subsection shall not apply to the payments provided for in subsection (3) of this section.

(6) In the case of new or reopened claims, if the supervisor of industrial insurance determines that, at the time of filing or reopening, the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section.

(7) The benefits provided by this section are subject to modification under RCW 51.32.067. [2007 c 284 § 2; 1993 c 521 § 2; 1988 c 161 § 1. Prior: 1986 c 59 § 1; 1986 c 58 § 5; 1983 c 3 § 159; 1977 ex.s. c 350 § 44; 1975 1st ex.s. c 224 § 9; 1973 c 147 § 1; 1972 ex.s. c 43 § 20; 1971 ex.s. c 289 § 8; 1965 ex.s. c 122 § 2; 1961 c 274 § 2; 1961 c 23 § 51.32.060; prior: 1957 c 70 § 31; 1951 c 115 § 2; prior: 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

Effective date—2007 c 284: See note following RCW 51.32.050.

Additional notes found at www.leg.wa.gov

51.32.067 Permanent total disability—Death benefit options—Election. (1) After a worker elects one of the options in (a), (b), or (c) of this subsection, that option shall apply only if the worker dies during a period of permanent total disability from a cause unrelated to the injury, leaving a surviving spouse, child, children, or other dependent. If, after making an election under this subsection, a worker dies from a cause related to the injury during a period of permanent

(c) The prior closure of the claim or the receipt of permanent partial disability benefits shall not affect the rate at which loss of earning power benefits are calculated upon reopening the claim.

(4)(a) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

(b) Once the worker returns to work under the terms of this subsection (4), he or she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician or licensed advanced registered nurse practitioner.

(c) If the worker returns to work under this subsection (4), any employee health and welfare benefits that the worker was receiving at the time of injury shall continue or be resumed at the level provided at the time of injury. Such benefits shall not be continued or resumed if to do so is inconsistent with the terms of the benefit program, or with the terms of the collective bargaining agreement currently in force.

(d) In the event of any dispute as to the worker's ability to perform the available work offered by the employer, the department shall make the final determination.

(5) No worker shall receive compensation for or during the day on which injury was received or the three days following the same, unless his or her disability shall continue for a period of fourteen consecutive calendar days from date of injury: PROVIDED, That attempts to return to work in the first fourteen days following the injury shall not serve to break the continuity of the period of disability if the disability continues fourteen days after the injury occurs.

(6) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages: PROVIDED, That holiday pay, vacation pay, sick leave, or other similar benefits shall not be deemed to be payments by the employer for the purposes of this subsection.

(7) In no event shall the monthly payments provided in this section:

(a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if the worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (7)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

(8) If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section. [2007 c 284 § 3; 2007 c 190 § 1; 2004 c 65 § 9. Prior: 1993 c 521 § 3; 1993 c 299 § 1; 1993 c 271 § 1; 1988 c 161 § 4; prior: 1988 c 161 § 3; 1986 c 59 § 3; (1986 c 59 § 2 expired June 30, 1989); prior: 1985 c 462 § 6; 1980 c 129 § 1; 1977 ex.s. c 350 § 47; 1975 1st ex.s. c 235 § 1; 1972 ex.s. c 43 § 22; 1971 ex.s. c 289 § 11; 1965 ex.s. c 122 § 3; 1961 c 274 § 4; 1961 c 23 § 51.32.090; prior: 1957 c 70 § 33; 1955 c 74 § 8; prior: 1951 c 115 § 3; 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

Reviser's note: This section was amended by 2007 c 190 § 1 and by 2007 c 284 § 3, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date—2007 c 284: See note following RCW 51.32.050.

Report to legislature—Effective date—Severability—2004 c 65: See notes following RCW 51.04.030.

Additional notes found at www.leg.wa.gov

51.32.095 Vocational rehabilitation services—Benefits—Priorities—Allowable costs—Performance criteria. *(Expires June 30, 2013.)* (1) One of the primary purposes of this title is to enable the injured worker to become employable at gainful employment. To this end, the department or self-insurers shall utilize the services of individuals and organizations, public or private, whose experience, training, and interests in vocational rehabilitation and retraining qualify them to lend expert assistance to the supervisor of industrial insurance in such programs of vocational rehabili-

EXHIBIT C

board, in ruling on a request for continuance, shall consider whether the request was timely made. For good cause shown, the board may grant a continuance and may at any time order a continuance upon its own motion. During a hearing, if it appears in the public interest or in the interest of justice that further testimony or argument should be received, the board may continue the hearing. Oral notice of a continuance, given at a hearing, shall constitute final notice of the continuance.

[Statutory Authority: RCW 19.28.123 and 19.28.590. 84-18-009 (Order 84-16), § 296-13-420, filed 8/27/84.]

WAC 296-13-430 Rules of evidence--Admissibility criteria. Subject to the other provisions of this chapter, all relevant evidence is admissible that, in the opinion of the board, is the best evidence reasonably obtainable, having due regard for its necessity, availability, and trustworthiness. In passing upon the admissibility of evidence, the board shall consider, but need not follow, the rules of evidence governing civil proceedings in the superior court of the state of Washington.

[Statutory Authority: RCW 19.28.123 and 19.28.590. 84-18-009 (Order 84-16), § 296-13-430, filed 8/27/84.]

WAC 296-13-440 Rules of evidence--Tentative admission--Exclusion--Discontinuance--Objections. When a party objects to the admissibility of evidence, the evidence may be received subject to a later ruling. The board may, either with or without objection, exclude inadmissible evidence or order cumulative evidence discontinued. A party that objects to the introduction of evidence shall state the precise grounds of the objection at the time the evidence is offered.

[Statutory Authority: RCW 19.28.123 and 19.28.590. 84-18-009 (Order 84-16), § 296-13-440, filed 8/27/84.]

Chapter 296-14 WAC
INDUSTRIAL INSURANCE

WAC

WAC 296-14-010 Reciprocal agreements--Industrial insurance. (1) In accordance with the authority contained in RCW 51.12.120, the director of the department of labor and industries has heretofore or may hereafter enter into certain reciprocal agreements with other states and provinces of Canada and the agencies of such states or provinces which administer workers' compensation laws with respect to conflicts of jurisdiction and the assumption of jurisdiction in cases where the contract of employment arises in one state or province and the injury occurs in another.

(2) Consistent with the provisions of RCW 51.12.120 and chapter 34.04 RCW, the director of the department of labor and industries has entered into reciprocal agreements with other states and provinces which are in full force and effect on the subject matter as set forth in subsection (1) which states and provinces are:

(a) Colorado
(b) Idaho
(c) Montana
(d) North Dakota
(e) Nevada
(f) Oregon
(g) Wyoming
(h) South Dakota
(i) New Mexico

(3) The reciprocal agreements as listed above in subsection (2) are hereby promulgated and adopted as regulations of the department in accordance with the provisions of RCW 51.12.120 and such reciprocal agreements shall be kept on file in the office of the director of the department of labor and industries and available for public inspection and review during the regular business hours of such office.

[Statutory Authority: RCW 51.04.020(1). 84-06-018 (Order 84-3), § 296-14-010, filed 2/29/84; Order 74-29, § 296-14-010, filed 5/29/74, effective 7/1/74.]

WAC 296-14-100 Definition of voluntary retirement and no longer attached to the work force. (1) For the purpose of this title a claimant will be deemed to be voluntarily retired and no longer attached to the work force if all of the following conditions are met:

(a) The claimant is no longer receiving income, salary or wages from any gainful employment.

(b) The claimant has provided no evidence, if requested by the department or the self-insurer, of a bona fide attempt to return to gainful employment after retirement.

(2) Payment made by the worker or on his or her behalf in the form of premiums, for the purpose of continuation of life or medical insurance coverage, union dues or similar payments shall not constitute attachment to the work force.

(3) The claimants of new or reopened claims will not be deemed voluntarily retired if the injury or occupational disease was a proximate cause of the decision to retire and sever the attachment to the work force.

[Statutory Authority: RCW 51.32.060, 51.32.090, 51.32.160, 51.21.220(6) [51.32.220(6)] and 51.32.240 (1), (2) or (3). 86-18-036 (Order 86-33), § 296-14-100, filed 8/28/86.]

WAC 296-14-150 Definition of gainful employment for wage. Gainful employment for wages for the purposes of RCW 51.32.160 shall mean performing work at any regular gainful occupation for income, salary or wages.

[Statutory Authority: RCW 51.32.060, 51.32.090, 51.32.160, 51.21.220(6) [51.32.220(6)] and 51.32.240 (1), (2) or (3). 86-18-036 (Order 86-33), § 296-14-150, filed 8/28/86.]

WAC 296-14-200 Waiver of recovery for worker compensation benefits overpayments. Whenever the director determines whether to exercise the discretion granted by RCW 51.32.240 (1), (2) or (3) or RCW 51.32.220(6) the following shall apply:

EXHIBIT D

WAC 296-14-100
Definition of voluntary retirement.

(1) **What is voluntarily retired?** The worker is considered voluntarily retired if both of the following conditions are met:

(a) The worker is not receiving income, salary or wages from any gainful employment; and

(b) The worker has provided no evidence to show a bonafide attempt to return to work after retirement.

Time-loss compensation is not paid to workers who voluntarily retired from the work force.

(c) Payment of union dues or medical or life insurance premiums does not constitute attachment to the work force.

(2) **When is a worker determined not to be voluntarily retired?** A worker is not voluntarily retired when the industrial injury or occupational disease is a proximate cause for the retirement.

[Statutory Authority: RCW 51.04.020. 99-18-062, § 296-14-100, filed 8/30/99, effective 9/30/99. Statutory Authority: RCW 51.32.060, 51.32.090, 51.32.160, 51.21.220(6) [51.32.220(6)] and 51.32.240 (1), (2) or (3). 86-18-036 (Order 86-33), § 296-14-100, filed 8/28/86.]

APENDIX E

NO. 44508-5-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

CAROLYN GIGER (ROBERT E. GIGER, DEC'D), Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES STATE OF WASHINGTON, Respondent.	MOTION TO PUBLISH UNPUBLISHED OPINION

TO: CLERK OF THE COURT, COURT OF APPEALS DIVISION TWO;

AND TO: CAROLYN GIGER, Respondent, by and through her attorney, STEVEN BUSICK.

I. IDENTITY OF MOVING PARTY

The Department of Labor and Industries (Department) moves for relief designated in Part II. The Department is the state agency charged by the Washington Legislature with the administration of the industrial insurance laws at issue here.

II. RELIEF SOUGHT

Under RAP 12.3(e), the Department seeks an order publishing the Court's Opinion filed September 3, 2014. A copy of the slip opinion is attached.

APENDIX F

III. FACTS RELATIVE TO MOTION

On September 3, 2014, this Court issued its Opinion in this case. The Court ruled it would not publish its decision in the Washington Appellate Reports, but would file it as a public record under RCW 2.06.040.

IV. GROUNDS FOR RELIEF

RAP 12.3(e) allows a party to move to publish an unpublished opinion. RAP 12.3(d) provides the criteria the appellate court uses to determine whether to publish an opinion. The Court considers:

> (1) Whether the decision determines an unsettled or new question of law or constitutional principle; (2) Whether the decision modifies, clarifies or reverses an established principle of law; (3) Whether a decision is of general public interest or importance or (4) Whether a case is in conflict with a prior opinion of the Court of Appeals.

RAP 12.3(d). The Court developed these criteria in *State v. Fitzpatrick*, 5 Wn. App. 661, 669, 491 P.2d 262 (1971).

The Department believes that this Court's opinion meets the second criterion for publication.

V. ARGUMENT

A. This Opinion Clarifies Established Principles of Law

This Court's decision clarifies established principles of law relating to voluntary retirement under the Industrial Insurance Act as that term was

APENDIX F

discussed in *Kaiser Aluminum Chem. Corp. v. Overdorff*, 57 Wn. App 291, 295, 788 P.2d 8 (1990); *Weyerhaeuser Co. v. Farr*, 70 Wn. App. 759, 765, 855 P.2d 711 (1993); and *Energy Nw. v. Hartje*, 148 Wn. App. 454, 466, 199 P.3d 1043 (2009). Specifically, the decision clarifies that a worker may not avoid a finding of voluntary retirement by asserting that the worker was attempting to appeal the Department order finding him capable of employment, and that a bona fide attempt to return to work would make him ineligible for the benefits contended on appeal. The Court notes that in *Hartje,* the worker had an appeal of the Department order finding her permanently partially disabled that was pending when she applied to reopen her claim based on worsening of her condition. Nevertheless, the dispositive issue in determining if she was voluntarily retired was whether she had the physical capacity to return to work but made no attempt to do so. The decision clarifies that a worker cannot avoid this requirement of a bona fide attempt to return to work because it would not be convenient to the outcome of another proceeding.

The decision also clarifies that the consequential condition doctrine under *Shirley v. Department of Labor & Industries*, 171 Wn. App. 870, 288 P.3d 390 (2012), *review denied*, 177 Wn.2d 1006 (2013), does not apply as that case involves death benefits, which are not wage replacement benefits.

The facts in this case are not unique, and a number of such appeals have been presented, and continue to be presented, to the Board of Industrial Insurance Appeals and in the courts where benefits are precluded on the basis that a worker has voluntarily retired from the workforce. Publication of this Court's interpretation will give guidance to other injured workers, employers, the Department, the Board of Industrial Insurance Appeals, and courts throughout the State of Washington.

B. **No Negative Consequences Exist Precluding Publication**

In *Fitzpatrick*, 5 Wn. App. at 669, the court listed criteria under which an opinion should not be published. The Department believes the Opinion in this case does not fall within these negative criteria.

Fitzpatrick's first criterion for not publishing is where an affirmance is based upon the conclusion that the evidence is sufficient to sustain a finding of fact. *Fitzpatrick*, 5 Wn. App. at 669. Here, the issues involved a question of law interpreting Court of Appeals rulings, a statute and administrative rule.

Fitzpatrick's second criterion for not publishing is whether an affirmance or reversal is readily determined by following legal principles well established by previous decisions. *Fitzpatrick*, 5 Wn. App. at 669. Here, the decision involves the effect of a pending appeal on a finding of

voluntary retirement and the consequential condition doctrine, issues not squarely addressed in *Overdorff*, *Farr*, or *Hartje*.

Fitzpatrick's third criterion for not publishing is when the Court's decision is based upon a question of practice or procedure. *Fitzpatrick*, 5 Wn. App. at 669. This case does not involve a question of practice or procedure.

VI. CONCLUSION

The Department believes that the Opinion meets the criteria in RAP 12.3(d)(2). Accordingly, the Department respectfully requests that the Court publish its Opinion in this case.

RESPECTFULLY SUBMITTED this 15 day of September, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CAROLYN GIGER,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

No. 44508-5-II

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH

APPELLANT moves for reconsideration and Respondent moves for publication of the Court's **September 3, 2014** opinion. Upon consideration, the Court denies the motions.

Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Maxa, Lee

DATED this 24th day of October, 2014.

FOR THE COURT:

Bjorgen, A.C.J.
ACTING CHIEF JUDGE

FILED
COURT OF APPEALS
DIVISION II
2014 OCT 24 PM 3:15
STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CAROLYN A. GIGER, Personal Representative of the Estate of ROBERT E. GIGER, deceased,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES; STATE OF WASHINGTON,

Respondents.

No. 44508-5-II

UNPUBLISHED OPINION

BJORGEN, A.C.J. — Carolyn Giger appeals from a summary judgment order dismissing her workers' compensation claim based on an injury to her deceased husband, Robert Giger.[1] The Board of Industrial Insurance Appeals (Board) had denied Robert's claim for temporary and permanent total disability benefits, arising out of the aggravation of a prior work-related injury, on the ground that Robert had voluntarily retired prior to the aggravation. Robert appealed to the superior court, and the Department of Labor and Industries (Department) moved for summary judgment, arguing that he had voluntarily retired as a matter of law prior to the aggravation, making him ineligible for the benefits sought. The superior court granted the Department's motion.

[1] We refer to the Gigers by their first names for clarity. We intend no disrespect.

Robert died while the motion was pending, and Carolyn Giger, as personal representative for his estate, appeals the grant of summary judgment in favor of the Department. She argues that material issues of fact remain as to whether Robert's industrial injury proximately caused his retirement and whether his failure to seek further employment was reasonable under the circumstances. Because resolution of these factual issues does not affect Robert's entitlement to the benefits he seeks, we affirm the Board's and the superior court's denial of Robert's claim.

FACTS

Robert sustained a back injury while employed as superintendent of the Larch Corrections Center in December 1985. Based on that injury, he filed a claim with the Department on January 9, 1986, which the Department closed the following April after awarding time loss compensation and medical benefits. The Department reopened the claim as of January 15, 1987. While the claim was still open, Robert retired from his job on April 1, 1988.

The Department closed Robert's claim again on November 8, 1990, after his doctor released him for full time employment, making a permanent partial disability award in addition to time loss compensation. Robert unsuccessfully appealed that decision to the Board, and then to the superior court, but did not pursue the matter further after the superior court affirmed the Board's decision and order. Even though Robert's doctor believed he was physically able to work, Robert remained retired. Robert acknowledged that he never sought gainful employment after 1988.

Robert was involved in motor vehicle accidents in 1992 and 1993, which he claimed aggravated his prior work related injury. For this reason, the Department reopened Robert's claim as of February 14, 1994, but awarded medical benefits only. In June 2010, the Department

denied Robert's request for total permanent disability benefits and for additional time loss compensation for the period from February 1994 to June 2010. After the Department declined to reconsider its decision, Robert appealed its order to the Board.

The Board assigned the case to an industrial appeals judge, who, after taking testimony and hearing argument, reversed the Department's order and remanded with instructions to pay Robert time loss compensation benefits from February 14, 1994 through June 25, 2010, and permanent total disability benefits thereafter. The Department petitioned the Board for review of the industrial appeals judge's proposed decision and order, and the Board reversed, affirming the Department's June 2010 decision denying Robert's claim and ordering Robert's claim to be closed.

Robert appealed the Board's decision and order to superior court, and the Department moved for summary judgment. After hearing argument from the parties, the superior court granted summary judgment to the Department, affirming the Board's decision and order. Carolyn appeals.

ANALYSIS

Carolyn argues that because material issues of fact remain, the superior court erred in granting summary judgment to the Department. Specifically, Carolyn maintains that if the 1985 injury was a proximate cause of the decision for Robert to retire in 1988, and if a reasonable person in Robert's position would not have sought to rejoin the work force after the Department closed his claim in 1990, then he was not a voluntarily retired worker under the industrial insurance statute, Title 61 RCW, when the Department reopened his claim in 1994. Therefore, Carolyn argues, material issues of fact remain as to Robert's eligibility for the requested benefits,

and summary judgment was improperly granted to the Department. Concluding that resolution of these factual issues does not affect Robert's entitlement to time loss compensation or permanent total disability benefits, we affirm the superior court's grant of summary judgment.

I. STANDARD OF REVIEW

The Industrial Insurance Act, Title 51 RCW, governs review of workers' compensation cases. Under the Act, we review the decision of the superior court in the same way as in other civil cases, rather than according to the judicial review provisions of the Administrative Procedure Act, chapter 34.05 RCW. *Mason v. Georgia-Pac. Corp.*, 166 Wn. App. 859, 863, 271 P.3d 381, *review denied*, 174 Wn.2d 1015 (2012) (citing RCW 51.52.140). On review of a summary judgment, we undertake the same inquiry as the superior court. *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353-54, 962 P.2d 844 (1998). A trial court should grant summary judgment only

> "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Romo, 92 Wn. App. at 353-54 (quoting CR 56(c)). The party seeking summary judgment bears the burden of establishing its right to judgment as a matter of law, and the court must consider facts and reasonable inferences from the facts in favor of the nonmoving party. *Romo*, 92 Wn. App. at 354.

A. Governing Law

"Time loss" benefits refer to "temporary total disability . . . compensation, a wage

replacement benefit paid under RCW 51.32.090." *Energy Nw. v. Hartje*, 148 Wn. App. 454, 463, 199 P.3d 1043 (2009) (quoting *Jacobsen v. Dep't of Labor & Indus.*, 127 Wn. App. 384, 386 n.1, 110 P.3d 253 (2005) (internal quotation marks omitted)). "Temporary total disability" means "a condition that temporarily incapacitates a worker from performing any work at any gainful employment." *Hartje*, 148 Wn. App. at 463 (quoting *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000) (internal quotation marks omitted)). "Permanent total disability" compensation, on the other hand, refers to benefits due to a worker who, as a result of an injury sustained in the course of his or her employment, suffers from a "condition permanently incapacitating the worker from performing any work at any gainful occupation." RCW 51.08.160; RCW 51.32.010; RCW 51.31.060.

We have categorized both temporary and permanent total disability compensation as "wage replacement" benefits because they serve to compensate injured workers for lost earnings. *Mason*, 166 Wn. App. at 867. In 1986, the legislature explicitly precluded voluntarily retired claimants from receiving such benefits. *Hartje*, 148 Wn. App. at 467 n.3 (citing LAWS OF 1986, ch. 58, § 5; ch. 59, §§ 2, 3, *recodified as* RCW 51.32.090(10)). WAC 296-14-100, also adopted in 1986, sets out the criteria for voluntary retirement, stating:

> (1) **What is voluntarily retired?** The worker is considered voluntarily retired if both of the following conditions are met:
> (a) The worker is not receiving income, salary or wages from any gainful employment; and
> (b) The worker has provided no evidence to show a bonafide attempt to return to work after retirement.
> Time-loss compensation is not paid to workers who voluntarily retired from the work force.
> . . . .
> (2) **When is a worker determined not to be voluntarily retired?** A worker is not voluntarily retired when the industrial injury or occupational disease is a proximate cause for the retirement.

The parties disagree as to whether these provisions apply in this case. Carolyn asserts they apply because Robert filed to reopen his claim in 1994, after the measures were enacted. The Department, on the other hand, contends that the provisions "are not directly applicable" because Robert's initial claim arose prior to enactment in 1986. Br. of Resp't at 12.

This disagreement, however, has no bearing on the proper resolution of this appeal. Because voluntarily retired persons do not qualify as "workers" under the Act and have no legitimate expectation of receiving wage income, we have held that, even for claims arising prior to the 1986 amendments, a claimant who voluntarily retired prior to the injury or aggravation at issue is not entitled to wage replacement benefits. *Weyerhaeuser Co. v. Farr*, 70 Wn. App. 759, 764-67, 855 P.2d 711 (1993); *Kaiser Aluminum & Chem. Corp. v. Overdorff*, 57 Wn. App. 291, 294-96, 788 P.2d 8 (1990). Prior to the adoption of the regulation defining voluntary retirement, we had similarly held that a person who, "despite having the physical capacity to engage in gainful employment," comes forward with "no evidence to indicate he intended or tried to work following his retirement" has voluntarily retired as a matter of law and become ineligible for wage replacement benefits. *Farr*, 70 Wn. App. at 765-66 (emphasis omitted). Thus, the application of the 1986 enactments does not affect the analysis.

B. Robert Voluntarily Retired, Making Him Ineligible for the Requested Benefits

A finding that a claimant is permanently partially disabled necessarily establishes that the person can engage in some form of gainful employment: otherwise, the claimant would be permanently totally disabled. *Farr*, 70 Wn. App. at 766. Because the superior court affirmed the

November 8, 1990 decision and order finding Robert permanently partially disabled, and Robert did not appeal that decision, it is now res judicata that Robert had the ability to perform gainful employment as of November 1990. *Hartje*, 148 Wn. App. at 469; *Farr*, 70 Wn. App. at 766. Thus, Robert had "the physical capacity to engage in gainful employment," *Farr*, 70 Wn. App. at 765-66, but was "not receiving income, salary or wages from any gainful employment" and admitted that he made no "bonafide attempt to return to work" thereafter. WAC 296-14-100; Board Record (BR) (Nov. 5, 2010) (Robert Giger) at 59. Thus, under the authority discussed above, Robert's status from November 8, 1990 forward was one of voluntary retirement.

Carolyn disputes whether this status was properly determined on summary judgment, noting that WAC 296-14-100(2)[2] specifies that "[a] worker is not voluntarily retired when the industrial injury or occupational disease is a proximate cause for the retirement." Br. of Appellant at 12. From this, Carolyn argues that, because Robert presented evidence that the 1985 accident led to his retirement in 1988, whether he qualified as voluntarily retired presented a genuine factual issue. The analyses in *Farr* and *Hartje*, however, foreclose this argument.

The facts in *Farr* closely resemble those presented here: In 1979, Farr filed to reopen a worker's compensation claim arising from a prior work related injury, and he retired the next year. *Farr*, 70 Wn. App. at 761. The Department allowed Farr's claim, closing it with a permanent partial disability award. *Farr*, 70 Wn. App. at 761. Five years after retiring, Farr again filed to reopen the claim after the injury became aggravated, and the Board ultimately found him permanently totally disabled and ordered the Department to award Farr a pension. *Farr*, 70 Wn. App. at 761. The employer, Weyerhaeuser, appealed to the superior court and

[2] Although Carolyn cites in her brief to section (3) of WAC 296-14-100, the correct section is (2).

moved for summary judgment, making essentially the same argument the Department makes here, which motion that court granted. *Farr*, 70 Wn. App. at 762.

On appeal to our court, Farr argued that he did not voluntarily retire because the "injury played a significant part in his decision to leave" Weyerhaueser. *Farr*, 70 Wn. App. at 765. We rejected that argument and affirmed the grant of summary judgment, pointing out that "[t]he fact that his partial injury may have played an indirect role in his decision to retire *from Weyerhaeuser* is irrelevant to the legal question at issue: whether Farr's retirement constituted voluntary withdrawal from the general work force." *Farr*, 70 Wn. App. at 766. We concluded that, because the Board made its finding that the aggravation of Farr's injury rendered him totally disabled sometime after he stopped working, and after the Department had found Farr only partially disabled, Farr, having presented no evidence that he had sought to reenter the workforce, was as a matter of law not entitled to total permanent disability benefits. *Farr*, 70 Wn. App. at 766-67.

Similarly, Hartje filed a workers' compensation claim after sustaining a work related injury in 1994, and the Department closed her claim with a partial permanent disability award. *Hartje*, 148 Wn. App. at 459. Hartje's employer, Energy Northwest, fired her in July 1997 after she failed to return to work, allegedly due to the injury. *Hartje*, 148 Wn. App. at 460-61. In 1999, Hartje filed to reopen her claim based on an aggravation of the injury. *Hartje*, 148 Wn. App. at 460. The Department reopened the claim, and the Board ultimately awarded Hartje temporary total disability benefits from Feb. 1, 1999 to Oct 6, 2004, even though she admitted she had not sought employment since leaving Energy Northwest. *Hartje*, 148 Wn. App. at 461-62.

Energy Northwest appealed, and we reversed. *Hartje*, 148 Wn. App. at 470. Hartje argued that she had not voluntarily retired "because she was not able to return to the work force due to her industrial injury." *Hartje*, 148 Wn. App. at 468. Following *Farr*, we rejected that argument, holding that because the Department had determined that Ms. Hartje was "capable of obtaining gainful employment as of October 2, 1996," after Energy Northwest had fired her, and Hartje admitted that she did not seek further employment, her injury was not, as a matter of law, "a proximate cause for her failure to return to the work force." *Hartje*, 148 Wn. App. at 469. "Hartje's intent to return to the work force after her voluntary departure . . . does not constitute a bona fide attempt," and thus "the Board erred as a matter of law in awarding her additional time loss compensation." *Hartje*, 148 Wn. App. at 468-69.

Therefore, the question is not whether Robert's injury proximately caused him to retire from the Larch Corrections Center in 1988: the question is whether the injury proximately caused him to subsequently withdraw entirely from the workforce. Because the 1990 order finding that Robert was partially disabled establishes that, subsequent to his retirement from the Larch Corrections Center, Robert had the ability to engage in some gainful employment, and he admitted that he did not thereafter seek to reenter the work force, he voluntarily retired as a matter of law under the precedents discussed above. He was thus ineligible for wage replacement benefits, and the superior court did not err in granting summary judgment to the Department.

Carolyn attempts to distinguish *Farr* on the ground that it was decided under the law prior to the statutory amendments discussed above. As discussed, the statutory changes in no way affect the analysis: *Farr* interpreted the pre-amendment statute to bar award of wage

replacement benefits to voluntarily retired workers, and *Hartje* interpreted the statute as amended to do the same.

Carolyn seeks to distinguish *Hartje* on the ground that, until September 4, 1992, Robert was attempting to appeal the Department's order finding him only partially disabled, and then suffered aggravating injuries in car accidents on November 12, 1992 and February 9, 1993. Citing *Hartje*, 148 Wn. App. at 469, Carolyn argues that if Robert reasonably refrained from seeking employment prior to the 1994 aggravation, he remained eligible for the requested benefits.[3] The cited authority does not support Carolyn's argument. To the contrary, Hartje's appeal of the Department's order finding her partially permanently disabled was pending at the time she filed to reopen her claim based on the aggravation of her injury. *Hartje*, 148 Wn. App. at 459-60. Further, the central criteria under *Farr*, 70 Wn. App. at 765-66, in determining whether one is voluntarily retired is whether one has the physical capacity to engage in gainful employment, yet failed to attempt to find work. To relieve Robert of this requirement in this proceeding because it might be inconvenient in another proceeding does not serve the determination of truth in either.

Carolyn also seeks to distinguish *Hartje* on the ground that the aggravation here resulted in part from treatment provided Robert for the 1985 injury. In doing so, Carolyn relies on the consequential condition doctrine, which allows an injured worker to recover for harms proximately caused by the work related injury, even where the harm also has other proximate causes, including the worker's subsequent negligence. Reply Br. of Appellant at 5 (citing *Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 886, 288 P.3d 390 (2012), *review denied*, 177

[3] Robert contended that his failure to seek employment was reasonable while his appeal was pending because doing so would have jeopardized his claim to temporary total disability benefits, and that he was subsequently prevented from seeking further employment by the aggravations of his injury resulting from the car accidents.

Wn.2d 1006 (2013)). The authority cited is inapposite. That the consequential condition doctrine entitled Robert to compensation for harms proximately caused by his injury, even if those harms also had other proximate causes, does not establish his entitlement to the requested benefits. *Shirley* involved survivor's death benefits, 171 Wn. App. at 880, which courts do not consider wage replacement benefits. *Mason*, 166 Wn. App. at 867. Thus, whether Shirley had voluntarily retired at the time of his death had no bearing on his spouse's entitlement to survivor's benefits. *See Mason*, 166 Wn. App. at 866-67 (holding that survivor's death benefits do not have the same purpose as wage replacement benefits and are thus not subject to the voluntary retirement limitation).

The question presented here is not whether Robert was entitled to nonwage replacement benefits, such as costs of medical treatment for harm proximately caused by his injury. Instead, the issue is whether Robert may receive benefits intended to "replace" wages that he did not earn because he voluntarily chose not to seek further employment. *Farr*, *Overdorff*, and *Hartje* clearly answer this question in the negative: Robert may not receive wage replacement benefits based on an aggravation that occurred after he voluntarily retired.

II. ATTORNEY FEES

Carolyn points out that if she were to prevail on this appeal, she would be entitled to attorney fees under RCW 51.52,130. However, she has not prevailed and accordingly is not entitled to fees under this provision.

CONCLUSION

The superior court did not err in granting summary judgment to the Department. Robert voluntarily retired as a matter of law prior to the aggravation of his injury and was thus not entitled to wage replacement benefits. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, A.C.J.

BJORGEN, A.C.J.

We concur:

Maxa, J.

MAXA, J.

J

LEE, J.