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NO. 47604-5-II

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL L. SIMS,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR AND INDUSTRIES' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In *Harrington* this Court held that a worker who has been classified as having permanent total disability cannot later be found to have additional disability as a result of an injury that took place after the worker had already become totally disabled. This is because "a subsequent lesser disability cannot be superimposed on top of the maximum disability recognized by the law." *Harrington v. Dep't of Labor & Indus.*, 9 Wn.2d 1, 8, 113 P.2d 518 (1941). This prevents "double payment." *Id.*

The parties here agree that a worker who is permanently totally disabled as a result of one injury cannot additionally sustain a permanent partial disability as a result of a second injury that happened after the worker was already "classified" as permanently totally disabled. The parties differ only as to when a worker is considered classified as permanently totally disabled and thus whether Michael Sims's (Sims) second injury occurred before or after that date.

The Court of Appeals resolved these questions by applying the case law from this Court, chiefly *Harrington* and *Clauson v. Department of Labor & Indus.*, 130 Wn.2d 580, 86 P.3d 826 (1996), and concluded that Sims is not eligible for a permanent partial disability award for his most recent injury because that injury happened after he was already permanently and totally disabled as a result of his first injury. The Court of

Appeals' decision is consistent with the principles underlying those cases and Sims has not established either a conflict between those cases and the Court of Appeals' decision or an issue of substantial public interest warranting this Court's review.

This Court should deny Sims's petition.

II. ISSUE PRESENTED

Discretionary review is not merited in this case, but if review were granted, the following issue would be presented:

> Did the Court of Appeals and trial court err in using the effective date that a worker becomes permanently and totally disabled when determining whether Sims could receive a permanent partial disability award for a later injury when Sims has received permanent total disability benefits going back to the date that he actually became permanently and totally disabled and when *Harrington* precludes a worker from receiving "overlapping" disability classifications and benefits?

III. STATEMENT OF THE CASE

A. This Appeal Involves Permanent Partial Disability and Permanent Total Disability

This case involves the interaction between two different types of disability classifications: permanent partial disability and permanent total disability. *See* RCW 51.08.150 (defining permanent partial disability); RCW 51.08.160 (defining permanent total disability).

An injured worker receives temporary benefits while he or she is

receiving treatment. *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766-67, 215 P.2d 416 (1950). When the worker's condition becomes "fixed" and stable, however, the Department of Labor and Industries (Department) then decides whether the worker should receive either permanent partial disability or permanent total disability benefits. RCW 51.32.055, .060, .080; *Franks*, 35 Wn.2d at 766-67.

Permanent Partial Disability: A worker has a permanent partial disability if the worker has sustained a loss of function as a result of an injury but remains capable of gainful employment. *See* RCW 51.08.150; RCW 51.32.080; *Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 586-87, 880 P.2d 539 (1994). A worker who is permanently and partially disabled receives a one-time fixed award of benefits that is based on the percentage of the loss of function caused by the injury. RCW 51.32.080.

Permanent Total Disability: A worker has a permanent total disability if the injury permanently incapacitates the worker from performing any work. RCW 51.08.160. A permanently and totally disabled worker receives a monthly pension, which is a wage replacement benefit. RCW 51.32.060; *Stone v. Dep't of Labor & Indus.*, 172 Wn. App. 256, 262, 289 P.3d 720 (2012).

B. The Board Found in a Prior Case That Sims Had Become Permanently Totally Disabled as of September 2010 as a Result of a 2003 Industrial Injury

Before he had the injury that is the subject of the current appeal, Sims injured his left arm in January 2003 while working as a professional mover. CP 38, 70-71. The Department allowed Sims's claim. CP 65. The Department closed his claim in September 2010 with a permanent partial disability award. CP 66. Sims appealed that decision to the Board of Industrial Insurance Appeals (Board) contending that his disability should be classified as permanent total disability. CP 66.

While Sims's appeal was pending, Sims went to work as a military "role-player" for Ho-Chunk, Inc. CP 66. Sims injured himself while doing that work in March 2012. CP 66. The Department allowed Sims's claim for that second injury. CP 66, 87.

In August 2012, the Board found Sims permanently and totally disabled as a result of his 2003 injury and ordered the Department to place Sims on the pension rolls effective September 2010, which meant that Sims received a back payment of monthly pension benefits going back to September 2010 as well as ongoing pension benefits. CP 66, 76-77. Sims did not appeal this order, and so the effective date of his permanent total disability became final. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994) (unappealed order is a final order,

precluding relitigation of its issues).

C. The Board Decided That Sims Was Not Eligible for a Permanent Partial Disability Award for His 2012 Injury Because That Injury Occurred After He Had Already Become Permanently Totally Disabled, and the Superior Court and Court of Appeals Affirmed

The Department closed Sims's March 2012 injury claim in February 2013 because it found that Sims did not need any additional treatment for his 2012 injury. CP 92. The Department did not provide Sims with a permanent partial disability award for his March 2012 injury because he was already permanently totally disabled as of September 2010 as a result of his 2003 injury. CP 92. The Board affirmed the Department's decision, concluding that the case law does not allow a worker to receive permanent partial disability for an injury that happens after the worker became permanently and totally disabled by a prior injury. CP 15, 36-39.

Sims appealed to superior court. CP 2-4, 164-73. The court granted summary judgment to the Department and affirmed the Board's decision. CP 215-17. Sims appealed to the Court of Appeals. The Court of Appeals affirmed. Sims now seeks review by this Court.

IV. ARGUMENT

Sims demonstrates no basis for this Court's review. The parties agree that Sims may not receive a permanent partial disability award for his 2013 injury if that injury happened after he was already classified as

permanently and totally disabled. Pet. at 7-11. The parties disagree only as to whether the "classification" date is the date that he actually became permanently and totally disabled or the date that an order was issued that found him to be permanently and totally disabled. The Court of Appeals' determination that the pertinent date is when the worker became totally disabled is consistent with the case law. *Sims v. Dep't of Labor & Indus.*, 195 Wn. App. 273, ¶ 28, __ P.3d __ (2016). This decision presents neither a conflict with Supreme Court case law nor an issue of substantial public interest. *See* RAP 13.4(d). The Court should decline review.

A. The Court of Appeals' Decision Does Not Conflict With *Clauson* and Presents No Issue of Substantial Public Interest

There are two lines of cases involved here. In the *Clauson* line, a worker may receive a permanent partial disability award for an injury that occurred before the injury that caused the permanent total disability, if the prior injury was considered under a separate claim and if that claim was pending at the time that the worker was classified as permanently and totally disabled. *Clauson*, 130 Wn.2d at 584-86; *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 254, 26 P.3d 903 (2001). In the *Harrington* line of cases, once a worker has been classified as being permanently and totally disabled by an injury, the worker may not receive lesser disability awards for new injuries that occur after the worker

became permanently and totally disabled. *Harrington*, 9 Wn.2d at 7-8; *Sorenson v. Dep't of Labor & Indus.*, 19 Wn.2d 571,574-75, 577-78, 143 P.2d 844 (1943); *Peterson v. Dep't of Labor & Indus.*, 22 Wn.2d 647, 651-52, 157 P.2d 298 (1945). Here, Sims falls under the *Harrington* line because the effective date of his classification as permanent totally disabled was before his second injury, and therefore Sims received all of the benefits to which he is entitled.

The Court of Appeals correctly concluded that Sims is not eligible for a permanent partial disability award for his second injury because that injury happened after the date that he actually became permanently and totally disabled as a result of his first injury. *Sims*, 195 Wn. App. 273, ¶¶ 30-35. The Court of Appeals' decision is fully consistent with the reasoning of both *Harrington* and *Clauson* and this Court need not disturb its ruling.

1. *Harrington* supports the view that the effective date that a worker became permanently totally disabled determines whether a worker may receive a permanent partial disability award for a later injury

The Court of Appeals' decision that Sims may not receive a permanent partial disability award for an injury that occurred after the date that he actually became permanently and totally disabled is consistent with this Court's decisions on this topic and was applied correctly to the

undisputed facts of this case. *Harrington* supports the Court of Appeals' conclusion that a worker's eligibility for a permanent partial disability award depends on the date that the worker actually became permanently and totally disabled, not the date that a decision was made that found the worker to have that status. This is because the rationale underlying *Harrington* is that permanent total disability is the highest form of disability recognized under the Industrial Insurance Act and a lesser form of disability cannot be "superimposed" on the maximum disability allowed for by law, and, therefore, a permanently and totally disabled worker cannot receive a lesser disability award for a subsequent injury.

As *Harrington* explains:

> A subsequent lesser disability cannot be superimposed upon the maximum disability recognized by the law. A contrary conclusion would result in an overlapping of classifications and in the allowance of double payment.

Harrington, 9 Wn.2d at 8. This principle applies with equal force whenever the second injury occurs after the worker had already, in fact, become permanently and totally disabled, regardless of when a formal decision was issued that declared the worker to be permanently and totally disabled. Since Sims was found to be permanently and totally disabled as of September 2010, and since Sims was granted monthly pension benefits effective September 2010 and onwards, granting Sims a permanent partial

disability award for his 2012 injury would result in "superimposing" permanent partial disability on top of permanent total disability, and thus an "overlapping of classifications" and "double payment," contrary to *Harrington*. *See Harrington*, 9 Wn.2d at 8.

Granting Sims a permanent partial disability award for his 2012 injury would result in overlapping classifications, and an overlapping of benefits, of exactly the kind that *Harrington* forbids because he would receive that award on top of the permanent total disability benefits that he began receiving effective 2010. Sims insists that he would not receive a double recovery if he received a permanent partial disability award for his 2012 injury because the order placing him on the pension rolls had not been issued at the time that he went back to work and had that injury. Pet. at 11. But Sims ignores the fact that his permanent partial disability award would, in fact, overlap with the pension benefits that were retroactively paid to him. CP 80-81; *see also* CP 39 (commenting that Sim's total disability benefits commenced in September 2010).

Because Sims's second injury occurred after he was permanently totally disabled, he may not receive a disability award for the second injury. Sims stresses that he did not return to work after the Board decision but this is of no moment. Pet. at 9. *Harrington*'s legal ruling was not entered based on the idea that a worker should be punished if he or she

returned to work after having received a pension from the Department. *See Harrington*, 9 Wn.2d at 7-8. Rather, *Harrington*'s ruling is grounded in the recognition that a worker who is already permanently and totally disabled as a result of an injury cannot sustain additional disability based on an injury that happened after the worker had already become permanently and totally disabled. The Act does not recognize a disability over and above permanent and total disability. *See Harrington*, 9 Wn.2d at 7-8. Sims's contention that it is unfair to punish him based on the fact that the Department erroneously found in 2010 that he was able to work misses the point: Sims is not being denied further benefits for his 2012 injury as a punishment, but as a consequence of the fact that the final determination in his case was that he was indeed permanently and totally disabled as of 2010. Pet. at 9-10.

Furthermore, it makes sense for a worker's eligibility for a permanent partial disability award to depend on when the worker actually became permanently and totally disabled because the worker's legal entitlement to industrial insurance benefits depends on the date that a worker actually became permanently and totally disabled. *See* RCW 51.32.060 ("When the supervisor of industrial insurance shall determine that permanent total disability results from the injury, the worker shall receive monthly [payments].").

The fact that Sims was found to be permanently and totally disabled as of September 2010 meant that Sims was entitled to back payments of permanent total disability starting in September 2010. Since Sims's right to receive pension benefits depends on the date that he actually became permanently and totally disabled, it makes sense that his eligibility to receive a permanent partial disability award for a later injury would also depend on the date that he actually became permanently and totally disabled.

2. The Court of Appeals decision is consistent with the reasoning of *Clauson* and does not conflict with it

The Court of Appeals' decision is also consistent with *Clauson.* In distinguishing its case from *Harrington,* the *Clauson* court repeatedly emphasized that Clauson was seeking a permanent partial disability award for an injury occurring before the injury that caused the worker to be permanently and totally disabled. *Clauson*, 130 Wn.2d at 581, 583, 585-86. *Clauson* expressly framed the issue as "whether a worker who has been awarded a permanent total disability pension under one worker's compensation claim may later receive a permanent partial disability award for a *prior* injury under a separate, *pre-existing* claim." *Clauson*, 130 Wn.2d at 581-82 (emphasis added); *accord McIndoe*, 144 Wn.2d at 254.

The *Clauson* Court bolstered its reasoning by relying on

RCW 51.32.060(4), which provides that a worker may receive a permanent partial disability award for a *prior* injury, but still be eligible for a pension.[1] *Clauson*, 130 Wn.2d at 584-85. *Clauson* does not suggest that a permanent partial disability award is appropriate for a second injury so long as the second injury happened before a formal legal decision was entered. The Court of Appeals' decision is fully consistent with the reasoning of *Clauson*, and Sims has not shown otherwise.

3. The liberal construction standard does not assist Sims, as Sims has not shown any statutory ambiguity

The liberal construction standard applies when there is ambiguity in a provision of the Industrial Insurance Act. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.3d 1056 (1993) (liberal construction does not apply to unambiguous terms of Industrial Insurance Act).Sims attempts to bolster his argument by noting that the Industrial Insurance Act is subject to liberal construction. Pet. at 11-12. However, the liberal construction standard does not aid Sims because he has not pointed to any ambiguity in a relevant statute. On the contrary, the statute relevant here, RCW 51.32.060(4), supports an award of permanent partial disability in addition to a pension only if permanent partial disability is sought for an

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[1] RCW 51.32.060(4) states:
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.

injury that occurred before the injury that caused the worker to be permanently and totally disabled. No matter how liberally that statute is construed, it does not support Sims's argument that he may receive a permanent partial disability award for an injury that occurred after he had already become permanently and totally disabled by a prior injury.

B. Sims's Novel Argument That *Clauson* Misinterpreted RCW 51.32.060 Does Not Present an Issue of Substantial Public Interest Because This Court Need Not Consider Arguments Raised for the First Time in a Petition for Review

Raising an argument he did not raise below, Sims argues that *Clauson* misinterpreted RCW 51.32.060(4), claiming that when RCW 51.32.060(4) references a "further accident" that results in permanent total disability after a previous injury caused the worker to be permanently and partially disabled, the statute was not referring to a worker who suffers a new injury after having suffered a previous injury, but rather an aggravation of the worker's original injury. Pet. at 13-14. However, this Court generally declines to consider arguments not raised below and Sims neither explains why he did not raise this theory below nor points to any reason why his novel contention now warrants review. *See Pappas v. Hershberger*, 85 Wn.2d 152, 153-54, 530 P.2d 642 (1975). This Court need not and should not consider Sims's novel argument that *Clauson* misinterpreted RCW 51.32.060(4).

In any event, aside from not being raised below, the argument lacks merit and does not warrant review. RCW 51.32.060(4) states:

> 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, not withstanding the payment of a lump sum for his or her prior injury.

The statutory term "further accident" unambiguously refers to an additional accident that occurs after a worker was partially disabled by a previous injury; it does not refer to a worker who has only had one injury and whose injury became aggravated at some point. If a worker has only had one industrial injury and that injury later became aggravated, it could not reasonably be said that the worker suffered a "further accident" as Sims suggests. The *Clauson* Court's discussion of RCW 51.32.060(4) is consistent with its plain meaning, while Sims's proffered interpretation of it is strained and unreasonable and at odds with the terms actually used by the Legislature.

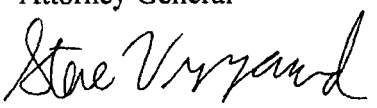
V. CONCLUSION

The Court of Appeals properly concluded that Sims is not entitled to a permanent partial disability award for an injury that occurred after a previous injury had already rendered him permanently and totally disabled. Contrary to Sims's argument, the Court of Appeal's decision does not conflict with *Clauson*, no issue of substantial public interest is

present, and this Court need not consider Sims's novel argument that Clauson misinterpreted RCW 51.32.060(4). This Court should deny review.

RESPECTFULLY SUBMITTED this 26th day of October, 2016.

ROBERT W. FERGUSON
Attorney General



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SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL L. SIMS, Petitioner, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Department of Labor and Industries' Answer to Petition for Review and this Declaration of Service to all parties on record by U.S. Mail and Email as follows:

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DATED this 26th day of October, 2016, at Tumwater, Washington.

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