No. 47604-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL L. SIMS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent,

APPELLANT'S OPENING BRIEF

Dorian D.N. Whitford, WSBA# 43351
Vail, Cross-Euteneier & Associates
819 Martin Luther King Jr. Way
P.O. Box 5707
Tacoma, WA 98415-0707
(253) 383-8770
Attorney for Michael L. Sims

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. Table of Cases

Washington Cases

Pages

Board Decisions

B. Statutes

Pages

C. Civil Rules

I. INTRODUCTION

Comes, now the Appellant, Michael L. Sims, Plaintiff below, by and through his attorney of record, Vail, Cross-Euteneier and Associates, per Dorian D.N. Whitford, and hereby offers this brief in support of his appeal.

This case originates under the Industrial Insurance Act, RCW Title 51, (the Act), from an administrative law review appeal from a July 29, 2014 Order Denying Petition for Review issued by the Board of Industrial Insurance Appeals (Board) which adopted a Proposed Decision and Order dated June 5, 2014 as its final Decision and Order. This decision held that Mr. Sims is not entitled to consideration for a permanent partial disability award for his March 13, 2012 industrial injury. The Department of Labor and Industries (Department) had closed his claim finding that he was not eligible for a permanent partial award under his claim.

Mr. Sims appealed that decision to Superior Court asserting that the Board had erred in not requiring the Department to consider his eligibility for a permanent partial disability award under his March 13, 2012 industrial injury claim.

The Superior Court affirmed the Board's decision after considering briefing and oral argument. Judgment was entered on April 24, 2015. As will be described further below, the law and policy of the Act leads to the

conclusion that the Department should have considered a permanent partial disability award under his claim for his March 13, 2012 industrial injury.

II. ASSIGNMENTS OF ERROR

a. The Superior Court erred in entering Conclusion of Law 2.2 which adopted the Board's Conclusions of Law Nos. 1 through 4 of the June 5, 2014 Proposed Decision and Order, adopted by the Board as its Final Order on July 29, 2014.

   i. Specifically, in adopting the Board's Conclusion of Law No. 2, the Superior Court erred in concluding that the Department of Labor and Industries is entitled to a decision as a matter of law as contemplated by CR 56.

   ii. In adopting the Board's Conclusion of Law No. 3, the Superior Court erred in concluding that Mr. Sims is not entitled to consideration of a permanent partial disability award for his March 13, 2012 industrial injury because of his receipt of total disability benefits commencing September 24, 2010, from his 2003 industrial injury claim. See RCW 51.32.060(4).

   iii. In adopting the Board's Conclusion of Law No. 4, the Superior Court erred in concluding that the June 19, 2013 order of the Department of Labor and Industries is correct and is affirmed.

b. The Superior Court erred in entering Conclusion of Law 2.3 which concluded the Board's July 29, 2014 order that adopted the June 5, 2014 Proposed Decision and Order is correct and is affirmed.

c. The Superior Court erred in entering Conclusion of Law 2.4 which concluded the June 19, 2013 Department order which affirmed the February 7, 2013 order, that closed the claim

without a permanent partial disability award, is correct and is affirmed.

III. ISSUE

Whether the Department of Labor and Industries should have considered Mr. Sims entitlement to a permanent partial disability award under his March 13, 2012 industrial injury claim when he was not determined to be a permanently totally disabled worker under a prior claim until an August 28, 2012 Decision and Order of the Board of Industrial Insurance Appeals?

IV. STATEMENT OF THE CASE

Michael L. Sims suffered an industrial injury while unloading a moving van while working for Ace Van & Storage, Inc. on January 6, 2003. CP[1] at 65. Mr. Sims filed a claim with the Department for this industrial injury which was allowed and benefits were provided, including some temporary total disability benefits. *Id.* at 65-6. This claim was numbered Y-308377. *Id.*

For this Y-claim, the Department stopped providing Mr. Sims temporary total disability benefits as of October 10, 2009 and on April 2, 2010, the Department closed Mr. Sims' Y-308377 claim, determining that he was only a permanently partially disabled worker who was capable of performing and obtaining reasonably continuous gainful employment. *Id.*

[1] The record of proceedings in this case is the Clerk's Papers. This will be cited CP.

at 66. Following a protest, this determination was affirmed on September 24, 2010. *Id.* at 66, 69.

On November 22, 2010, through counsel, Mr. Sims filed an appeal with the Board seeking additional benefits, including a determination that he was a permanently totally disabled worker as of September 24, 2010. *Id.* Following a rescheduling of the hearings on this appeal, the Board ultimately determined on August 28, 2012 that Mr. Sims was a permanently totally disabled worker as of September 24, 2010. *Id.* at 69-77. The Department awarded Mr. Sims his pension on September 11, 2012. *Id.* at 80.

While this litigation at the Board was taking place, Mr. Sims sustained an injury while working as a military role-player for Ho Chunk Inc. at Fort Lewis on March 13, 2012[2]. *Id.* at 66. This claim was allowed by the Department on April 2, 2012, numbered AR-47376, and benefits were provided in the form of medical treatment. *Id.* at 87. On February 7, 2013, the Department closed Mr. Sims' AR-47376 claim without a permanent partial disability rating examination being performed and affirmed its determination after a protest on June 19, 2013. *Id.* at 66, 90. Along with the affirmance order, the Department issued a letter stating that

[2] Limited work, or employment, that does not constitute a living wage and total permanent disability are not necessarily mutually exclusive. *Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286, 294, 499 P.2d 255 (1972).

due to Mr. Sims being placed on a pension under his Y-308377 claim, he was not entitled to any permanent partial disability benefits under his AR-47376 claim. *Id.* at 92. Mr. Sims appealed this order to the Board. CP at 43-45.

On the appeal of this AR-claim, the case was decided on competing motions for summary judgment. CP at 36-9. On July 29, 2014, the Board adopted the Proposed Decision and Order issued by the Industrial Appeals Judge granting summary judgment for the Department finding that its determination was correct that Mr. Sims is not entitled to consideration of a permanent partial disability award for his March 13, 2012 industrial injury because of his receipt of total disability benefits commencing on September 24, 2010 from his 2003 industrial injury claim. CP at 15, 36-9. This July 29, 2014 Board determination was appealed to Superior Court and was affirmed.

Mr. Sims appeals and respectfully requests that the Court find that he is eligible for consideration of a permanent partial disability award under this claim, his AR-claim, and remand this matter to the Department to make a determination as to his entitlement to a permanent partial disability award under claim number AR-47376.

V. STANDARD OF REVIEW

The initial step in seeking review of a decision of the Department is to appeal that decision to the Board. RCW § 51.52.060. At the Board, the appealing party, in this case Mr. Sims, has the burden of presenting a prima facie case for the relief it seeks. RCW § 51.52.050(2)(a).

When deciding an appeal from a decision of the Board, the Superior Court conducts a de novo review of the Board's decision but relies exclusively on the certified board record. RCW § 51.52.115. The Board's findings and decision are prima facie correct and the party challenging the decision has the burden of proof. *Id.* The presumption of correctness is a limited one, meaning that the decision will be overturned if the trier of fact finds from a preponderance of the credible evidence that the findings and decision of the Board are incorrect. *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 20-21, 277 P.3d 685 (2012) (internal citations omitted) *see also* RCW § 51.52.115. Only if it finds the evidence to be equally balanced does the presumption require the findings to stand. *Id.*

In an appeal from a Superior Court's decision in a case under Title 51, the ordinary civil standard applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). Here, the Superior Court considered whether the Board's decision to grant summary judgment was correct. This Court reviews summary judgment motions de novo, engaging in the same inquiry as the trial court. *Afoa v. Port of Seattle,*

176 Wn.2d 460, 466, 296 P.3d 800 (2013); *see also* RCW § 51.52.140. Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law CR 56(c).

The Department is charged with administering the Act, so the Court of Appeals affords substantial weight to its interpretation of the Act, but the Court of Appeals may nonetheless substitute its judgment for that of the Department's because its review of the Act is de novo. *Dana's Housekeeping, Inc. v. Dep't of Labor & Indus.*, 76 Wn. App. 600, 605, 886 P.2d 1147 (1995).

Here, there are no factual questions. Rather, there is a legal question to be reviewed de novo. Namely, whether Mr. Sims is eligible for a permanent partial disability award under his AR-claim for his industrial injury which occurred on March 13, 2012.

VI. ARGUMENT

(1) Introduction: Principles of Statutory Interpretation

In addressing the issues in this case, it is proper for the Court to consider certain over-arching principles of statutory construction and the broad policy of the Act. The Act is to be liberally construed by the Courts in favor of injured workers, RCW § 51.12.010. The Washington Supreme Court has repeatedly stated:

> The Industrial Insurance Act mandates that its provisions be 'liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and or death occurring during the course of employment.' RCW § 51.12.010. Courts, therefore, are to resolve doubts as to the meaning of the Act in favor of the injured worker.

McIndoe v. Dep't of Labor & Indus., 144 Wn.2d 252, 257, 26 P.3d 903 (2001), citing *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 230, 883 P.2d 1370 (1995); *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996) ("All doubts as to the meaning of the Act are to be resolved in favor of the injured worker."); *Dep't of Labor & Indus. v. Johnson*, 84 Wn. App. 275, 277-78, 928 P.2d 1138 (1996) (The Act, RCW 51, "is to be construed liberally in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the employee."), *review denied*, 131 Wn.2d 1001.

In this case, it is important to keep these principles in mind such that Mr. Sims' economic suffering is reduced to a minimum and he receives benefits for which he is eligible to receive and is entitled to under his industrial injury claim.

(2) Mr. Sims is Eligible for a Permanent Partial Disability Award Under his AR-47376 Claim.

Our state's courts have looked at similar issues before. When addressed with the issue of whether a worker, who is classified as a permanently totally disabled (PTD) worker and had been placed on a pension, may receive a permanent partial disability (PPD) award for a claim, unrelated to the PTD determination, which developed prior to the pension award, the Supreme Court held that: a worker may receive [PPD] benefits for a valid occupational injury or disease claim that preexisted and is unrelated to the worker's [PTD] condition if the [PPD] claim is filed within the statute of limitations. *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 266, 26 P.3d 903 (2001).

In *McIndoe*, the Department received three workers' occupational disease hearing loss claims after each of their previous claims had been closed and the workers placed on the pension rolls. *Id.* at 254-256. The Department closed the hearing loss claims with no awards for PPD. *Id.* After working its way through the appeals process, this Court noted the differences between PPD benefits (loss of function) and PTD benefits (loss of wage earning capacity) and reversed the Department based on the fact that injured workers should not be penalized by the sequence of the filing of claims, that the Act is to be liberally construed, that there would be no double recovery, and that the holding of *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 582, 925, P.2d 264 (1996) (injured worker was

entitled to receive both PTD benefits under his 1983 claim and PPD benefits under his 1973 claim, which was reopened in 1987, because his PPD claim was open and pending with the Department when he was determined to be entitled to PTD benefits in 1989).

This is not unlike the situation here with Mr. Sims. Similarly, in Mr. Sims case, his March 13, 2012 industrial injury claim was allowed and open with the Department prior to and when his January 6, 2003 industrial injury claim was ultimately determined to have resulted in him being a PTD worker by the Board in its Decision and Order dated August 28, 2012, and by the Department in its order dated September 11, 2012. When his March 13, 2012 industrial injury took place, the only determination that had been made by the Department was that Mr. Sims was only a PPD worker when it affirmed the closure of his 2003 claim on September 24, 2010.

Subsequent to that closure, Mr. Sims was injured while working on March 13, 2012 and his timely filed claim was allowed and medical treatment was provided. Mr. Sims was not awarded a pension or determined to be a PTD worker until August 28, 2012 by the Board, and the Department's order issued pursuant thereto on September 11, 2012. Mr. Sims was determined to be a PTD worker based upon the injury to his low back and resulting mental health conditions related to that injury. The

determination was wholly independent and unrelated to his industrial injury to his knee and ankle on March 13, 2012. At the time the PTD determination was made, Mr. Sims' AR-47376 claim was open and pending before the Department. Therefore, under *McIndoe*, he should be found eligible for a PPD award under this claim.

Additionally, the Board in its significant decision *In re Roy Sulgrove*, BIIA Dec, 88 0869 (1989), similarly determined that although on a pension under one claim, an injured worker is not precluded by law from receiving a PPD award under another claim if the condition covered under that other claim was fixed and stable prior to the date the worker was placed on a pension. While not binding authority, these significant decisions are instructive to the Court.[3]

In that case, Mr. Sulgrove was injured on July 18, 1980 and he filed a claim which was allowed. He was placed on a pension under that claim on September 4, 1987. *Id.* at 2. Before he was pensioned, he filed an occupational disease claim on March 31, 1986. *Id.* After much delay, the Department allowed the occupational disease claim on September 17, 1987 and closed the claim on November 2, 1987 with no PPD. *Id.* On appeal at the Board, the Department argued that Mr. Sulgrove could not legally

[3] The Board publishes its significant decisions and makes them available to the public. RCW § 51.52.160. These decisions are nonbinding, but persuasive authority for this Court. *O'Keefe v. Dep't of Labor and Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005).

receive PPD benefits under his occupational disease claim because he was on a pension. *Id.* at 3. The Board determined that Mr. Sulgrove was not legally barred from receiving PPD benefits under his occupational disease claim because he was pensioned under the 1980 claim, there would be no double recovery, and remanded the matter back to the Department to make the initial determination on his entitlement to a PPD award. *Id.* at 4-5.

Like Mr. Sulgrove, Mr. Sims had an open and pending claim at the Department when he was awarded a pension in August and September of 2012. Thus, Mr. Sims should be determined to be eligible for a PPD award under this claim as a matter of law as it would not be double recovery because it would be compensating an unrelated industrial injury, and this matter should be remanded back to the Department to make an initial determination as to his entitlement to a PPD award.

(3) The *Harrington* Line of Cases are Distinguishable

The Board decided that, even though there is a compelling economic argument in Mr. Sims' favor, it must agree with the argument from the Department. Equity and fairness should have led to a finding for Mr. Sims. The Department argued that the *Harrington* line of cases establish that Mr. Sims cannot get a PPD award because the effective date of his pension was prior to his date of injury under this claim. However, the *Harrington* line of cases are easily distinguishable from the case at bar.

The claimants in *Harrington* and *Sorenson* were awarded pensions by the Department and then later on returned to work and suffered additional injuries.

In *Harrington*, the worker sustained an injury while working in September of 1933. *Harrington* v. *Dep't of Labor & Indus.*, 9 Wn.2d 1, 2, 113 P.2d 518 (1941). The claim was allowed and the worker was awarded a pension in April of 1938. *Id.* Subsequent thereto, the injured worker returned to work and was injured again on October 16, 1939 and filed a claim on November 24, 1939, over a year and a half after he had been awarded a pension. *Id.* at 3.

In *Sorenson*, the worker was injured on January 10, 1929 and was awarded a pension which was converted into a lump sum payment on July 21, 1936. *Sorenson* v. *Dep't of Labor & Indus.*, 19 Wn.2d 571, 571-72, 143 P.2d 844 (1943). The injured worker returned to work and worked from November of 1937 to May 25, 1938 when he was injured again. *Id.* at 572.

In *Peterson* v. *Dep't of Labor & Indus.*, 22 Wn.2d 647, 648, 157 P.2d 298 (1945), the worker was injured on January 8, 1940 and placed on the pension rolls on November 9, 1942. The worker successfully appealed for a determination that he was only a permanently partially disabled

worker. Under that classification, he could continue to work and be covered by the Act.

These cases hold that a worker who receives compensation for a permanent total disability cannot return to the workforce and later obtain benefits for a subsequent injury. The facts of this case are inapposite. Here, Mr. Sims was determined by the Department to only be a permanently partially disabled worker, and hence capable of working, when he went back to limited work and was injured in March of 2012. Mr. Sims did not return to work after he was determined to be a permanently totally disabled worker like the injured workers in the *Harrington* line of cases. While the effective date of his pension may have been in September of 2010, the determination had not been made until after his injury had taken place under this present claim. The determination had not been made when Mr. Sims' claim was allowed by the Department.

What if Mr. Sims had received from the Department a PPD award for his March 13, 2012 industrial injury in May of 2012, well before the determination was made on August 28, 2012 that he was in fact permanently and totally disabled as of September 24, 2010? In that situation, Mr. Sims would have received both types of benefits under his claims. Mr. Sims should not be penalized by the timing and sequence of his claims.

Below, the Department argued that *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 26 P.3d 903 (2001) is distinguishable from the present case because the hearing loss claims in that case were suffered before the totally disabling injuries. CP at 124-25, 178-80. However, the claimants in *McIndoe* suffered industrial injuries in 1987, 1989, and 1994, respectively. *Id.* 144 Wn.2d at 254-55. The hearing loss claims were all filed in 1996. *Id.* The benefits under the hearing loss claims were for wholly unrelated conditions. Thus, Mr. Sims case is analogous to *McIndoe* because he is seeking a permanent partial disability award (a benefit of a different character than total disability benefits), for a claim that was timely filed, allowed, and for a condition completely unrelated to the permanently disabling conditions.

In summary, Mr. Sims should not be punished by the Department's erroneous determination that he was only a permanently partially disabled worker on September 24, 2010. This would be unfair. The Board's August 28, 2012 determination that he was permanently and totally disabled under his 2003 claim was wholly independent and unrelated to Mr. Sims conditions under this present claim. When the determination was made, Mr. Sims had an open and allowed claim pending at the Department. He is entitled to consideration for a permanent partial disability award under this claim and this would not amount to a double recovery. Mr. Sims was

not awarded a pension and then return to work, get injured, and subsequently seek additional benefits which would amount to a double recovery. In real time in 2012 when Mr. Sims was working and was injured, he had only been determined to be a permanently partially disabled worker. Thus, there is no improper double recovery. Fairness dictates a finding for Mr. Sims.

VII. CONCLUSION

Pursuant to the above case law, Mr. Sims respectfully requests that the Court reverse the Superior Court's April 24, 2015 judgment which affirmed the Board's July 29, 2014 order, and find that he is entitled to consideration for a permanent partial disability award under this claim, and remand this matter back to the Department to make the initial determination on his entitlement to a PPD award and take further action in accordance with the law and facts.

Finally, Mr. Sims further requests attorney's fees pursuant to RCW § 51.52.130.

DATED this 28th day of September, 2015.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and ASSOCIATES

By: _____

DORIAN D.N. WHITFORD
WSBA No. 43351
Attorney for Appellant

CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 28th day of September, 2015, the document to which this certificate is attached, Appellant's Opening Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Steve Vinyard
Assistant Attorney General
P.O. Box 40121
Olympia, WA 98504-0121

DATED this 28th day of September, 2008.

LYNN M. VENEGAS, Secretary