

No. 330940 & 331431

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

FILED
SEPT 14, 2015
Court of Appeals
Division III
State of Washington

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

v.

BLANCA ORTIZ & UNIVERSAL FROZEN FOODS,

Appellants.

APPELLANT UNIVERSAL FROZEN FOODS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
I. SELF-INSURED EMPLOYER’S REPLY ARGUMENT	1
A. The Trial Court’s Error is Undisputed on Appeal.	2
B. The Trial Court Erred in Failing to Affirm the Board’s Order Requiring the Department to Issue Payment from the Second Injury Fund.....	3
1. “Risk” of recovery argument is disingenuous.	4
2. Employer’s overpayment was of pension benefits	5
3. The Second Injury Fund should bear the risk of nonrecovery.....	8
II. CONCLUSION.....	12

TABLE OF AUTHORITIES

	Page
CASES	
<i>Boeing Co. v. Doss</i> , 183 Wn.2d 54, 347 P.3d 1083 (2015).....	7
<i>Crown, Cork & Seal v. Smith</i> , 171 Wn.2d 866, 259 P.3d 151 (2011).....	8, 9
<i>In re Frederic Cuendet</i> , BIIA Dec., 99 21825 (2001)	5, 9, 10, 11
<i>Jussila v. Dept. of Labor & Indus.</i> , 59 Wn.2d 772, 370 P.2d 582 (1962).....	7, 9
<i>Tingey v. Haisch</i> , 159 Wn.2d 652, 152 P.3d 1020 (2007).....	8
STATUTES	
RCW 51.16.120	5, 6

I. SELF-INSURED EMPLOYER'S REPLY ARGUMENT¹

The court should not be deceived by the Department's attempt to appear as an innocent bystander in this case. First, the Department is a party to every claim. Even in self-insured claims, the employer and the worker must go to the Department to obtain closing orders, pension orders, overpayment orders and second injury relief orders. Second, the Department was utterly without basis to deny employer's request for an overpayment order, yet did deny that request, requiring employer to take this case through litigation to obtain the order it now concedes should have issued. Third, the Department admits it has a legal obligation to recover the overpayment on employer's behalf, but still argues the trial court's ruling that it has no such obligation or authority should be affirmed. Last, the Department made the theoretical double payment to Ortiz a reality by issuing her a large lump sum check for past pension payments despite its own earlier order affirming that employer paid her time loss already for that past period.

This appeal should not be about which party was "more wrong" or acted in its own interest. The Department has made errors and acted in its

¹ Employer disagrees with the Department's assertion that Ortiz lacks standing for the reason outlined in Ortiz's Reply Brief. Employer believes repayment should occur from the Second Injury Fund.

own interest at least as much as any other party, despite being a state agency entrusted to carry out its authority to issue overpayment orders, collect overpayments, and grant Second Injury Relief. This appeal pertains to whether the trial court erred in its factual findings and legal conclusions, and whether the Department is obligated to issue repayment to employer from the Second Injury Fund.

A. The Trial Court's Error is Undisputed on Appeal.

The Department's brief concedes the trial court erred. The Department now agrees with employer that it has a statutory obligation to recover the overpayment on employer's behalf. Department's Br. at 1, 8; CP 191, 244. Finding of Fact 1.10 and Conclusion of Law 2.2 by the trial court are erroneous. Contrary to the trial court's ruling, the Department has statutory authority – even a statutory obligation – to recover the overpayment. As the Department offers no disagreement, employer will not reiterate its argument on this point here. See *Universal Frozen Foods*' Br. at 15-19. Because the trial court erred on this fundamental point, reversal of the judgment is required.

Additionally, the trial court erred in finding the agreement of the parties created the overpayment. Finding of Fact 1.5 formed the foundation for the entirety of the trial court's ruling. On appeal, the Department largely ignores this issue. It offered no direct argument about

what caused the overpayment, nor disagreed with employer's argument that only the Department has authority to issue orders placing a worker on pension or an order of overpayment. See *Universal Frozen Foods' Br.* at 12-15. This factual finding by the trial court poisoned the whole of the ruling; this inaccurate finding led the trial court to wrongly conclude that the Department had no obligation or authority to recover the overpayment. This provides a second, independent basis for reversal of the trial court's judgment.

The Department asks the court to affirm the judgment of the trial court, but does so by mischaracterizing the nature of that judgment as simply a ruling on whether the Department had to advance repayment to employer from the Second Injury Fund. The trial court, however, ruled the Department had no obligation or authority to recover the overpayment whatsoever. As the Department's own arguments confirm, the trial court erred in this regard and must be reversed.

B. The Trial Court Erred in Failing to Affirm the Board's Order Requiring the Department to Issue Payment from the Second Injury Fund.

Although the parties really agree the trial court erred and must be reversed, they disagree on whether the Department must simply reimburse employer as it recovers from Ortiz, or must reimburse employer from the Second Injury Fund up front as the Board found.

1. “Risk” of recovery argument is disingenuous.

The ability of the respective parties to “discover” the overpayment or the “ideal” process for dealing with retroactive pension orders is irrelevant to the legal issue presented here. Such is irrelevant because the Department concedes it erred in denying an overpayment order and because it concedes it has an obligation to recover the overpayment on employer’s behalf. The overpayment exists. The Department’s obligation to recover and reimburse employer for that overpayment is undisputed. Discovery of the overpayment has no bearing on whether the Department must reimburse employer from the Second Injury Fund, or as it recovers from Ortiz, or from the self-insured employer relief fund.

Additionally, the Department had all the information at its disposal to “discover” the overpayment before it paid Ortiz double. Its own orders, original and reconsidered, noted that time loss benefits were paid through May 2010. CP 113, 114. These were the orders Ortiz appealed that led to the parties’ agreement. The Department had the information; it clearly failed to look up the information before issuing the double payment to Ortiz. Irony permeates the Department’s claim that it is being asked to bear the risk of non recovery of the overpayment. In fact, the Department created the risk of non recovery by double paying Ortiz rather than looking at its own orders and recognizing the overpayment – an

overpayment it had a statutory obligation to recover on behalf of employer. At the time, the Department already knew the Board would require it to reimburse employer out of the Second Injury Fund. *In re Frederic Cuendet*, BIIA Dec., 99 21825 (2001). As a state agency, the Department should have anticipated its obligations, and carefully guarded the state funds it has been entrusted to administer. The actions of the Department – mistake, sloppiness, or carelessness – resulted in the need to recover from Ortiz in the first place.

2. Employer’s overpayment was of pension benefits

A central theme of the Department’s argument is that the Second Injury Fund cannot be used to pay an overpayment of time loss because its use is limited to payment of monthly pension benefits. Pension benefits and time loss benefits are both wage-replacement benefits, and in this case, an order confirmed payments from 2002 to 2008 were pension payments.

RCW 51.16.120 speaks of total, permanent disability. The Department attempts to argue that because employer’s payments were for temporary disability, not permanent disability, the statute does not allow repayment to employer from the Second Injury Fund. However, to sustain this argument, the court would have to ignore the established facts of this case. As of 2002, as a final matter of law, Ortiz was permanently and

totally disabled and granted a pension. CP 125. The Department's attempt to argue the Second Injury Fund does not apply because employer paid "temporary" benefits cannot be sustained as it goes against the law of the case – from 2002 forward Ortiz had permanent total disability. Further, as a final matter of law, employer is entitled to Second Injury Relief as of 2002, less the permanent total disability contribution ordered by the Department. CP 165. In other words to quote from the statute, "the total cost of the pension reserve" from 2002 forward less the amount charged to employer "shall be assessed against the second injury fund." RCW 51.16.120(1).

By virtue of these two final orders, employer paid the pension to Ortiz but has yet to obtain Second Injury Relief. Although the Department issued orders allowing both retroactive placement on pension and retroactive relief, it wants to avoid actually paying that relief. The Department may not like the situation created by orders, but the orders are final. Nothing in the statutes allows the Department to grant relief on paper but refuse to actually carry out its obligation. Employer is entitled to relief from 2002 forward for pension payments it made to Ortiz. Although considered "time loss" at the time paid, the July 16, 2011 order established these wage replacement benefits were actually permanent

wage replacement benefits. The Department's refusal to pay employer for the Second Injury Fund's obligation runs counter the statutory scheme.

The cases cited by the Department – *Doss* and *Jussila* – simply do not support the Department's argument. In *Jussila v. Dept. of Labor & Indus.*, 59 Wn.2d 772, 780, 370 P.2d 582 (1962), the Court determined the Second Injury Fund did not apply because the worker's disability was due to the injury in question, not the combined effects of that and a prior injury. It did not address overpayments, but did emphasize that the purpose of the Second Injury Fund should be furthered by making it easier for employers to access relief when their injury was not the cause of total disability. *Id.* at 779. In that way, it supports employer's argument.

In *Boeing Co. v. Doss*, 183 Wn.2d 54, 347 P.3d 1083 (2015), the issue was whether the Second Injury Fund would pay for post-pension medical treatment. The Court concluded that the Second Injury Fund related to wage replacement benefits, not medical treatment, so did not cover medical costs. *Id.* at 59, 63. *Doss* does not support the argument that the Department cannot repay employer for time loss paid. In fact, *Doss* tangentially supports the Board's conclusion that employer should be repaid from the Second Injury Fund because it clarifies that pension benefits are wage replacement benefits – benefits of the same nature that employer overpaid. When temporary wage replacement, they are labeled

“time loss” and when permanent wage replacement, they are labeled “pensions”. Employer is not attempting to gain an overpayment of medical services or payment of the portion of disability caused by its own injury.

3. The Second Injury Fund should bear the risk of nonrecovery.

Contrary to the Department’s arguments, the Second Injury Fund statutes do indicate a legislative intent that the Fund, and not the self-insured employer, should bear the risk of of an overpayment. As the Department notes, the courts look to statutory language, context and greater statutory scheme to determine legislative intent. *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). The Department manipulates the statutory language in an attempt to create an excuse for why it would not have to actually give employer the Second Injury Relief it granted for 2002 forward. It also glosses over the purposes behind the second injury statutes.

It is not only the Board that has addressed the underlying purpose of the Second Injury Fund. The Washington Supreme Court has previously considered the purpose and held the fund has a dual purpose of encouraging the hiring of disabled workers and assuring employers bear the cost for disabilities caused by their own injuries. *Crown, Cork & Seal*

v. *Smith*, 171 Wn.2d 866, 873, 259 P.3d 151 (2011); *Jussila*, 59 Wn.2d 772, 778-79. The Department focuses on the first of these purposes and ignores the second. Yet, the Supreme Court emphasized that even the broader industrial insurance act was premised on an employer bearing the cost of its own injuries. *Jussila* at 779. The Supreme Court – not just the Board – stated that “any rule which makes it easier for an employer to obtain reimbursement from the fund will tend to support the basic purpose of the fund.” *Id.* This comes directly from one of the cases the Department cites in depth, yet the Department fails to acknowledge the courts’ consideration of the legislative intent behind the second injury statutes.

In *Cuendet*, the Board cited to the Supreme Court’s policy statements regarding the Second Injury Fund, including the notation that any rule making it easier for an employer to benefit from the fund supports its underlying purpose. *Cuendet*, BIIA Dec., 99 21825. Its conclusion that it was consistent then to place the risk of on the Department aligns with the Supreme Court’s decisions both before and after *Cuendet*. See *Smith*, 171 Wn.2d 866, 873; *Jussila*, 59 Wn.2d 772, 778-79. Neither the legislature nor the courts have offered any change or clarification in the fourteen plus years since *Cuendet*. The Board’s reasoning is firmly rooted

in the Supreme Court case law coupled with the practical fact that the Department administers the Second Injury Fund:

“By law, the self-insurer is relieved from paying further time loss compensation as of the effective date of the pension. The payment of the pension benefits is the responsibility of the Department. The Department’s authority to use monies from the second injury fund for pension payments logically includes the power to reimburse the self-insured employer for payment of total disability benefits for which the Department is responsible...”
Cuendet at *4.

Cuendet closely mirrors the facts here. In *Cuendet*, neither the placement on pension nor the grant of Second Injury Relief were disputed. Here, both are established by final orders. As the Board noted, the pension retroactively relieved the employer from paying time loss, and it rightly considered the payments the employer made in that period to be in essence the total disability payments for which the Department was responsible. The Board did not ignore that the Second Injury Fund related only to pensions; it found no dispute that the payments by the employer amounted to pension payments based on the undisputed entitlement to a pension as of an earlier date. The Department’s attempt to create a technical distinction certainly contradicts the mandate that any rule making it easier for an employer to obtain relief should be applied to further the purpose of the Second Injury Fund.

Finally, the Department's suggestion that the Board's decision (in *Cuendet* or in this case) goes against the purposes of the Second Injury Fund lacks merit. The Department's position would make it harder for an employer to obtain meaningful Second Injury Relief. Undisputedly, employer had to pay time loss until a closing order established the end to time loss in May 2010, and these payments have been finally determined to be due to an injury other than that with employer, and thus the obligation of the Second Injury Fund. Not reimbursing employer from the Second Injury Fund thwarts the purpose of the Fund and of the broader act. Allowing the Department to blindly issue retroactive pension benefits, and then refuse to reimburse an employer from the Fund, certainly does not promote hiring of previously disabled workers or make it easier for employers to obtain relief. Reading the overpayment statutes and Second Injury Fund statutes together, the Board's conclusion is both correct and consistent with the purpose of the Fund and Act. Practically speaking, the Department has the ability to remedy overpayments in the context of Second Injury Fund Relief, and granting that relief up front to an employer – leaving the Department with the burden to recover– makes it easier for employers to obtain the relief for which the Fund was created.

The trial court erred in reversing the Board's order requiring the Department to issue immediate repayment to employer from the Second

Injury Fund. Where the Board's reasoning was sound, the trial court's is lacking. The rule the Department seeks contravenes the purposes of the Second Injury Fund.

II. CONCLUSION

The Department failed to directly address the factual findings and legal conclusions of the trial court, and despite its request for a decision affirming, its own arguments reveal that the trial court erred. The trial court's Findings of Fact 1.5, 1.10 and Conclusions of Law 2.2 and 2.3 are all at error and require reversal.

Further, the trial court erred in failing to adopt the Board's finding that the Department must reimburse employer from the Second Injury Fund for its payments to Ortiz after the effective date of her pension. Any other outcome contradicts the purpose and statutory scheme of the Second Injury Fund. For the reasons outlined herein, employer respectfully asks the Court to reverse the trial court's decision and affirm the decision of the Board.

DATED: September 14, 2015

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed a copy of **APPELLANT UNIVERSAL FROZEN FOODS' REPLY BRIEF** via e filing with the following:

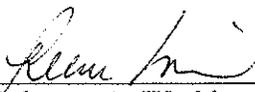
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