

FILED

JUL 31 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 33316-7-III

Superior Court No. 12-2-00933-2

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

RONALD H. BEELER, individually,

Appellant

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent

BRIEF OF APPELLANT

**Smart, Connell, Childers &
Verhulp, P.S.**

Darrell K. Smart, #15500

Attorneys for Appellant

501 N. 2nd St.

P.O. Box 228

Yakima, WA 98907

(509) 573-3333

CONTENTS

I. INTRODUCTION	1
II. FACTS	1
III. ASSIGNMENTS OF ERROR	4
IV. ISSUES RELATED TO THE ASSIGNMENTS OF ERROR	5
V. ARGUMENT	5
A. Standard of review.....	5
B. Analysis	6
Mr. Beeler was entitled to receive a permanent partial disability rating under the knee/umbilical hernia claim (AG83408) and the head, neck and back claim (AF70814)	6
The trial court improperly determined Mr. Beeler was a totally and permanently disabled worker effective September 21, 2009 based on the combined effects of all three claims.	10
VI. The Industrial Insurance Act is to be Liberally Construed in Favor of Injured Workers.	12
VII. Attorney Fees	12
VIII. CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<i>Brand v. Dep't of Labor and Indus.</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999).....	15
<i>Clauson v. Dep't of Labor & Indus.</i> , 130 Wn.2d 580, 583, 925 P.2d 624 (1996) 6, 7, 8, 9, 14	
<i>Dennis v. Dep't of Labor & Indus.</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987).....	14
<i>Kahn v. Salerno</i> , 90 Wn. App. 110, 117, 951 P.2d 321 (1998).....	5
<i>McIndoe v. Dep't of Labor & Indus.</i> , 144 Wn.2d 252, 26 P.3d 903 (2001)...	7, 10, 11, 12
<i>Redding v. Virginia Mason Med. Ctr.</i> , 75 Wn. App. 424, 426, 878 P.2d 483 (1994)	6
<i>Ruff v. King County</i> , 125 Wn.2d 697, 703, 887 P.2d 886 (1995).....	6
<i>Seybold v. Neu</i> , 105 Wn. App. 666, 675, 19 P.3d 1068 (2001).....	5
<i>Young v. Dep't of Labor & Indus.</i> , 81 Wn. App. 123, 129, 913 P.2d 402, <i>review denied</i> , 130 Wn.2d 1009 (1996).....	14

Statutes

RCW 51.04.010	7, 11
RCW 51.08.160	1, 3
RCW 51.12.010	11
RCW 51.32.060	1, 4, 6, 8, 9
RCW 51.52.130	12

Rules

RAP 18.1	12
----------------	----

I. INTRODUCTION

This case involves a worker's compensation issue, which is governed by Title 51 RCW. The underlying facts are not in dispute but the parties disagree as to how the law is applied to the facts. (RP 1) The case is before this court on Mr. Ronald Beeler's appeal of the trial court's determination that the Board of Industrial Appeals' (Board) decision that he was not entitled to receive permanent partial disability benefits for two unrelated industrial injury claims at the same time he was receiving a pension¹ as a totally and permanently disabled worker on a third unrelated industrial injury claim.

II. FACTS

In 2007, Mr. Beeler was employed as a sheet metal worker. (CP 56) In 1994 he and his wife, Shannon Beeler, started a gutter installation company they named "A Continuous Gutter." (CP 49, 56)

On November 8, 2007, while working for A Continuous Gutter Mr. Beeler stood up from a bent position. As he stood, he struck his head and neck on some extension ladders that were overhead. (CP 53) Mr. Beeler eventually sought treatment from Dr. Palmatier who diagnosed a closed head injury, and cervical and "t-spine" sprains. (CP 53, 57) Mr. Beeler suffered

¹ Permanent total disability benefits are provided to claimants who are rendered incapable of any type of work at any gainful occupation as a result of an industrial injury. RCW 51.08.160 *infra*; 51.32.060

two more industrial injuries that same day under different circumstances. He stepped off a ladder rung incorrectly and twisted his left ankle. This motion also caused a small umbilical hernia. (CP 49) The final injury occurred when Mr. Beeler attempted to pick up a roll of metal that weighed approximately 150 pounds. As he lifted the roll, both of his thumbs simultaneously popped out of joint. (CP 51)

Mr. Beeler filed three separate claims with the Department of Labor and Industries (Department) associated with the above injuries. (RP 1; CP 49, 51, 53, 74) Dr. Palmatier treated Mr. Beeler's injuries on all three claims. (CP 57) Claim number AG83409 (thumbs) involved the bilateral thumb injuries, which was diagnosed as arthritis. He had surgery on his right thumb but it remains painful. He has difficulty using his hands and cannot grip tools. (CP 56, 59) The second claim, AG83408 (knee/hernia), was for his left knee injury as well as the umbilical hernia injury. (CP 49) The third claim, AF70814 was for the closed head injury, and cervical and thoracic sprains. (CP 53) The Department accepted each of these claims as valid industrial injuries and paid disability benefits, including time loss payments on each. (RP 2; CP 38, 46)

On September 21, 2009, the Department closed the claim related to Mr. Beeler's bilateral thumb injuries with a permanent partial disability rating. (CP 59, 74) The knee/hernia injury claim and the head, neck and back injury claim were still in open status at the Department. No new order had issued

and Mr. Beeler continued to receive permanent partial disability benefits for each.

Rather than accept the Department's claim closure Mr. Beeler was forced to file an appeal of the Department's decision. On November 30, 2010, an Industrial Appeals Judge (IAJ) issued a Proposed Decision and Order (PDO), which concluded that as of September 21, 2009 Mr. Beeler was a totally and permanently disabled worker as set forth in RCW 51.08.160.² (CP 55-60, 74) On January 18, 2011, a three-person Board affirmed the PDO in a Decision and Order (DO). (CP 64) The order determined Mr. Beeler was a totally and permanently disabled worker based solely on the effects of his bilateral thumb injuries. The new order corrected and superseded the Department's original September 21, 2009 order. (CP 60, 64, 66) Importantly, neither the November 30, 2010 PDO nor the January 18, 2011 DO discussed the other two unrelated industrial injury claims that had occurred on the same day as the bilateral thumb injuries. (CP 55-61, 64) During the pendency of the bilateral thumb litigation the Department continued to pay Mr. Beeler disability benefits for the other two industrial injuries. (RP 2; CP 38, 46, 74) On February 2, 2011, the Department issued orders for these unrelated two claims, determining that due to the combined

² RCW 51.08.160 states: "Permanent total disability" means loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation.

effects of his three injuries Mr. Beeler was now totally and permanently disabled. (CP 35, 38, 43, 46) It concluded Mr. Beeler should have been found totally and permanently disabled on all three claims effective September 21, 2009. (RP 2; CP 38, 46)

Once Mr. Beeler was found to be a totally permanently disabled worker under all three claims the Department, for the first time, determined Mr. Beeler had received an “overpayment” of more than \$21,000 because time loss benefits had been paid under the other two claims at the same time the bilateral thumb claim was being litigated before the Board. (CP 38, 46) Mr. Beeler unsuccessfully appealed that decision to the Board. (CP 74) In an appeal to the Yakima County Superior Court the parties filed cross motions for summary judgment. (RP 1; CP 1, 4-14, 16-22, 24-27) The trial court, relying on RCW 51.32.060, affirmed the Board’s determination that Mr. Beeler was not eligible under the specific facts of his case to receive permanent partial disability benefits on the other two claims once he was found totally and permanently disabled due to the bilateral thumb injury. (RP 6)

III. ASSIGNMENTS OF ERROR

- (1) The trial court erred when it failed to adjudicate the permanent partial disability issue to which Mr. Beeler was entitled on two of his industrial injury claims; and
- (2) The trial court erred when it failed to determine Mr. Beeler was entitled to permanent partial disability benefits for the other two unrelated industrial injury claims that were still in open status at the Department

after he was placed on the pension rolls under the bilateral thumb claim, which would offset any overpaid time loss payments.

IV. ISSUES RELATED TO THE ASSIGNMENTS OF ERROR

(1) Is the Department's February 2, 2011 order erroneous as a matter of law because it determined Mr. Beeler was totally and permanently disabled due to the combined effects of his three separate industrial injury claims after the Board had previously found, in a litigated matter, that Mr. Beeler was totally and permanently disabled effective September 21, 2009 solely on the basis of his bilateral thumb claim?

(2) Is Mr. Beeler entitled to the permanent partial disability benefits awarded under the other two unrelated industrial injury claims (i.e. knee/hernia claim and head, neck and back claim)?

V. ARGUMENT

A. Standard of review

A trial court's summary judgment decision is reviewed de novo. *Seybold v. Neu*, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001). Upon review of an order granting summary judgment, this court engages in the same examination as did the trial court, considering all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998). Because there were cross motions for summary judgment the facts and inferences are weighed equally. Summary judgment is appropriate if the record before the court demonstrates there is no genuine issue as to any material fact. If this is accomplished the moving party is entitled to judgment as a matter of law. CR 56(c); *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). An appellate court may affirm the trial court's disposition of a summary

judgment motion on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

Additionally, the trial court based its decision on RCW 51.32.060 and two cases that interpreted that statute. The construction of a statute is a question of law that is reviewed de novo. *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 583, 925 P.2d 624 (1996).

B. Analysis

Mr. Beeler was entitled to receive a permanent partial disability rating under the knee/umbilical hernia claim (AG83408) and the head, neck and back claim (AF70814)

On appeal, the trial court made its decision based solely on the interpretation of the facts of this case as they apply to RCW 51.32.060(4), which 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." To aid in its decision the court relied on two Washington cases that interpreted the statute: *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 925 P.2d 624 (1996) and *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 26 P.3d 903 (2001). The trial court ultimately concluded that the circumstances surrounding Mr. Beeler's three industrial injury claims did not justify an award of permanent partial disability on the two claims still in open status when the decision regarding the bilateral

thumb injury was decided. (RP 6) Mr. Beeler contends this is an error of law because the *Clauson* and *McIndoe* holdings support the assertions noted in his motion for summary judgment. (CP 16-22) The trial court recited the facts of *Clauson* but made no analysis to Mr. Beeler's case.

The *Clauson* court held that an injured worker should *not* be denied benefits for a permanent partial disability award that was pending at the time an award for total and permanent disability was made. *Clauson*, 130 Wn.2d at 586. It further clarified its opinion by holding that a worker that was classified as permanently and totally disabled and who was awarded a pension could not be additionally compensated for industrial injuries which occur *after* the permanent total disability classification. Like Mr. Clauson, Mr. Beeler's other two unrelated claims for which he was receiving permanent partial disability benefits were pending at the time the Board determined he was totally and permanently disabled as a result of his thumb injury. Pursuant to *Clauson*, Mr. Beeler seeks to continue receiving his permanent partial disability award for the other two injury claims filed under two different claim numbers each of which occurred *before* the bilateral thumb injury, which was not adjudicated as a permanent total disability until February 2, 2011. (CP 66)

Similar to Mr. Beeler's case, Mr. Clauson was awarded *permanent partial disability* under one worker's compensation claim and then later received a *permanent total disability* award for a second injury under a

separate, pre-existing claim. *Id.* at 582-83. Because Mr. Clauson was already receiving a pension under the second injury the Department closed the first claim without making an additional award. *Id.* at 582. On appeal, the court properly resolved the controversy (as it must under the Industrial Insurance Act - RCW 51.04.010), in Mr. Clauson's favor determining he should *not* be denied benefits under one claim merely because that injury was not medically fixed and stable until one week after the second claim was resolved. *Id.* at 586.

The trial court correctly found that the *Clauson* holding applies under these facts. Mr. Beeler should have continued to receive permanent partial disability benefits for the two different claims unrelated to the bilateral thumb claim. The trial court committed an error of law when it incorrectly applied the facts of Mr. Beeler's case to RCW 51.32.060(4). However, Mr. Beeler agrees with the Department that it has the right to deduct any previously paid and duplicative time-loss benefits awarded and paid (under the head, neck and back claim and the knee/hernia claim) from any permanent partial disability awards paid under these two claims. He does not want nor expect to receive double recovery.

McIndoe was a consolidated case involving three claimants with loss of hearing claims as well as other unrelated industrial injuries. *McIndoe*, at 254. Although the facts are different, the *McIndoe* court followed the *Clauson* court's line of reasoning. *McIndoe*, at 264-266. The *McIndoe* court

explained the partially disabling condition must occur before permanent total disability is awarded *and* the permanent partially disabling claim was pending when the claim resulting in the permanent total disability was closed. *Id.*

Unlike the facts in Mr. Beeler's appeal the *McIndoe* court framed the issue as whether a worker that is classified by the Department as permanently totally disabled and awarded a pension may *thereafter* receive a permanent partial disability award for an unrelated occupational disease which had developed *prior* to the pension award. *McIndoe*, at 256. The workers in *McIndoe* sought permanent partial disability awards for hearing loss, an occupational disease that almost certainly occurred over many years of exposure to load noise. This process most likely took place many years before their pensions were awarded. The *McIndoe* court explained that RCW 51.32.060(4) (the statute cited as controlling by the trial court in Mr. Beeler's case) specifically *allows* full payment of permanent partial disability claims for injuries occurring prior to, and unrelated to the permanent total disability claim. *Id.* at 266.

The *McIndoe* holding does not apply under Mr. Beeler's facts because he is not requesting permanent partial disability payments for his arthritic thumbs.

Here, the trial court relied on the similarity of hearing loss to arthritis in that both would occur over a long period of time during a worker's career.

(RP 5) It stated: “[T]he Department determined in this case that the arthritis was an exposure case over a long period of time to his work environment . . .” *Id.* Mr. Beeler finds no place in the record where the Department made this “determination.” This application of incorrect facts to the relevant statute constitutes an error of law that must be reversed.

Additionally, the *McIndoe* facts do not apply under the facts of Mr. Beeler’s appeal because he was already receiving permanent partial disability benefits before, during and after the point in time that the Department, *then* the Board determined he was totally and permanently disabled based solely on the bilateral thumb claim. The Department initially paid permanent partial disability benefits under all three unrelated claims. While the bilateral thumb injury claims were being litigated the Department continued to pay Mr. Beeler permanent partial disability benefits for the two claims unrelated to the bilateral thumb injury or to each other except they all occurred on the same day.

The trial court improperly determined Mr. Beeler was a totally and permanently disabled worker effective September 21, 2009 based on the combined effects of all three claims.

As a result of the Department’s original September 21, 2009 decision Mr. Beeler was essentially forced to either litigate the claim closure or accept it. He chose to litigate the claim closure and was found by the Board to be a totally and permanently disabled worker effective September 21, 2009 solely

under the bilateral thumb claim. Once the Board made that decision the Department lacked the authority to re-adjudicate the issue at a later date thus, the bilateral thumb decision is res judicata and cannot be further considered in any context.

The Department stated in its February 2, 2011 decision that “. . . this worker has three industrial injury claims that render him totally permanently disabled.” Although the words “combined injuries” are not used it is certainly implied and that is certainly what the Department did – it determined he was permanently and totally disabled based on the effects of the three combined injuries. At that point Mr. Beeler was placed on the pension rolls for all three claims and his permanent partial disability benefits were taken away all the way back to November 21, 2009, a period of nearly 18 months. This resulted in a huge overpayment of time loss benefits totaling over \$21,000. (CP 46) In so doing, the Department consolidated all three claims into one pension even though the thumb injury had already been litigated and decided. It almost appears the Department was making an attempt to retroactively re-adjudicate the basis of Mr. Beeler’s total and permanent disability status - perhaps to avoid paying him the permanent partial disability benefits to which he was entitled under his other two claims? This action is contrary to the laws of our state but more importantly it violates the spirit and intent of the Industrial Insurance Act.

VI. The Industrial Insurance Act is to be Liberally Construed in Favor of Injured Workers.

The Industrial Insurance Act is to be liberally interpreted in favor of injured workers, with all doubts resolved in favor of injured workers. See, *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987); RCW 51.04.010; RCW 51.12.010. The *Dennis* court held: "To this end, the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and it 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." *Id.* at 470; see also, *Clauson*, supra; *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 129, 913 P.2d 402, *review denied*, 130 Wn.2d 1009 (1996). To take money from Mr. Beeler's pension would be to rob him of what is rightfully his. Under the Industrial Insurance Act Mr. Beeler is entitled to his pension for the bilateral thumb claim and the permanent partial disability rating for the knee/hernia injury claim as well as the head, neck and back injury claim.

VII. Attorney Fees

If successful in his appeal, Mr. Beeler requests attorney fees pursuant to RAP 18.1, RCW 51.52.130³ and *Brand v. Dep't of Labor and Indus.*, 139

³ The relevant portion of RCW 51.52.130(1) provides: "If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or

Wn.2d 659, 989 P.2d 1111 (1999). In deciding an attorney fee request this court is to look to both the statutory scheme and the historically liberal interpretation of the Industrial Insurance Act in favor of the injured worker. Additionally, it is vital to recognize that the purpose behind the statutory attorney fees award is to ensure adequate representation for the injured worker who is forced to appeal from Department rulings in order to obtain compensation due on their claim. *Id.* at 667-70.

VIII. CONCLUSION

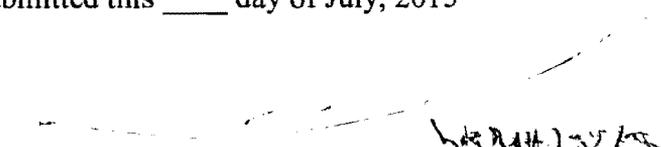
The trial court committed an error of law when it determined Mr. Beeler was not eligible for permanent partial disability because the knee/umbilical hernia injuries and the head, neck and back injuries were sustained after the bilateral thumb claim for which he was found totally and permanently disabled. Examining the record below and utilizing the proper Washington statutes and case law as it relates to the Industrial Insurance Act Mr. Beeler is entitled to the permanent partial disability awards to which the Department originally found him eligible. It was only *after* the Department decided to combine the effects of all three injury claims (thereby determining Mr. Beeler was now permanently and totally disabled) that it terminated his permanent partial disability award. Not only did the Department suddenly find Mr. Beeler totally and permanently disabled, it retroactively applied its

beneficiary ... a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court."

decision nearly 18 months back to September 21, 2009. This of course caused a huge overpayment of time loss benefits Mr. Beeler must now repay from his pension. Taking money from Mr. Beeler's pension deprives him of what is legally and rightfully his pursuant to the Industrial Insurance Act. For the above reasons Mr. Beeler respectfully requests reversal and modification of the trial court's April 10, 2015 decision.

Respectfully submitted this ____ day of July, 2015

for



Darrell K. Smart WSBA No. 15500
Attorney for Appellant

FILED

JUL 31 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 33316-7-III

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

RONALD BEELER ,)
)
) Appellant,)
)
 vs.)
)
) DEPARTMENT OF)
) LABOR & INDUSTRIES,)
) Respondent.)
 _____)

**DECLARATION OF
SERVICE**

STATE OF WASHINGTON)
) ss.
 County of Yakima)

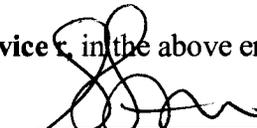
I, Susan Little, do hereby certify that I am an employee of Smart, Connell, Childers & Verhulp, PS, attorneys for the Respondent. That I am a citizen of the United States and competent to be a witness herein. That on the 29th day of April, 2015, I sent, via United States Mail at Yakima, Washington, first class postage prepaid addressed as follow:

Court of Appeals, Division III
Clerk's Office
500 North Cedar St.
PO Box 2159
Spokane, WA 99201

Ronald Vinyard, AAG
Office of the Attorney General
PO Box 40121
Olympia, WA 989504

an envelope containing the true and correct copy of the following documents:

Appellant's Brief and Declaration of Service in the above entitled case.



Susan Little, Legal Assistant to
Darrell K. Smart