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

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RONALD H. BEELER,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES  
OF THE STATE OF WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR AND INDUSTRIES**

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## I. INTRODUCTION

A request for a permanent partial disability award must be supported by evidence of permanent partial disability. Ronald H. Beeler (Beeler) is not entitled to a permanent partial disability award for either of his two injury claims because those injuries caused him to be totally rather than partially disabled. The Industrial Insurance Act provides permanent total disability benefits for workers who are completely unable to work as a result of their injuries and permanent partial disability awards for workers who suffer a loss of function as a result of their injuries but who remain able to work. Where two or more injuries jointly produce permanent total disability, the worker is provided with total disability benefits but may not receive a permanent partial disability award for any injury that contributed to the permanent total disability.

A worker who is placed on a pension for one claim is not necessarily entitled to permanent partial disability for other claims, contrary to Beeler's arguments that he should automatically receive such a benefit. As established by *Shea v. Department of Labor & Industries*, 12 Wn. App. 410, 529 P.2d 1131 (1974), a controlling case that Beeler neither cites nor refutes, a worker can be totally disabled by one injury or disease and also, independently, be totally disabled by other injuries. Where a worker has permanent total disability due to one claim and also,

independently, has permanent total disability due to other injuries in other claims, the worker is properly classified as permanently totally disabled for each of those claims. As Beeler has failed to rebut the Department of Labor and Industries' (Department's) determination that he was totally disabled by the injuries for which he seeks partial disability benefits, the Board of Industrial Insurance Appeals and the superior court properly affirmed the Department's denial of partial disability benefits and this Court should affirm.

## **II. STATEMENT OF THE ISSUES**

- 1.** Is a worker entitled to a permanent partial disability award when the worker presented no evidence rebutting the Department's finding that the injuries caused permanent total disability?
- 2.** Does res judicata prevent the Department from finding that Beeler was permanently and totally disabled by his two injuries based on a finding in a prior case that Beeler's thumb condition rendered him totally and permanently disabled, when a worker can be classified as permanently and totally disabled on multiple claims when the claims independently produces permanent and total disability, and when the Department found that Beeler's two injuries caused him to be permanently and totally disabled independently of the effects of his thumb claim?

3. May the Department recoup an overpayment of benefits out of the pension benefits that Beeler is receiving under his thumb claim, when it is undisputed that Beeler has received an overpayment of benefits that should be repaid, and when RCW 51.32.240 provides that when there is an overpayment of benefits “recoupment may be made from any future payments due to the recipient on any claim”?
4. May Beeler receive an award of attorney fees on appeal, when RCW 51.52.130 provides for an award only if a decision of the Board is reversed and a fund managed by the Department is impacted by the litigation, and when Beeler should not prevail on appeal and, in any event, cannot receive any remedy beyond a remand even if this Court accepts his legal arguments?

### III. STATEMENT OF THE CASE

#### A. **This Appeal Involves Permanent Partial Disability, Permanent Total Disability, and Temporary Total Disability**

This case involves a number of different workers’ compensation terms and the interaction between three different types of disability classifications: permanent partial disability, permanent total disability, and temporary total disability. *See* RCW 51.32.090 (providing for temporary total disability benefits); 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; when the worker’s condition becomes stable and “fixed,” then the Department decides whether the worker should receive either permanent partial disability or permanent total disability benefits.

RCW 51.32.055, .060, .080; *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766-67, 215 P.2d 416 (1950).

A worker has sustained a permanent partial disability if the worker has suffered a loss of function as a result of an injury, but remains capable of gainful employment. See 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 fixed award of benefits, which is based on the percentage of the loss of function that the worker was left with by the injury.<sup>1</sup> RCW 51.32.080.

A worker has sustained permanent total disability if the injury proximately caused the worker to be permanently incapable of any type of gainful employment. RCW 51.08.160. A worker who is permanently and totally disabled receives a pension, which is a wage replacement benefit. *Stone v. Dep't of Labor & Indus.*, 172 Wn. App. 256, 262, 289 P.3d 720 (2012).

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<sup>1</sup> RCW 51.32.080 provides a specific dollar amount that shall be awarded for a complete loss of function related to some types of conditions (such as hearing loss) but does not specify a specific dollar amount for other types of injuries (such as low back injuries). When RCW 51.32.080 specifies an award for a specific type of injury, a physician provides an opinion regarding the percentage of the worker's loss of function, and the worker receives an award that corresponds to that percentage.

When RCW 51.32.080 does *not* specify the award for a given type of injury, the worker's impairment is measured using a category system that the Department adopted by rule. RCW 51.32.080; WAC 296-20-200 to -690. A physician provides an opinion as to which category of impairment best describes the worker's disability WAC 296-20-200 to -690.

Here Beeler received permanent total disability benefits and now he also seeks permanent partial disability benefits. During the administration of his claim before his condition became stable and “fixed,” he also received temporary total disability benefits. CP 46. A worker receives temporary total disability if his or her condition has not yet become fixed or stable, and the worker is temporarily incapable of working. RCW 51.32.090; *Bonko v. Dep’t of Labor & Indus.*, 2 Wn. App. 22, 25-26, 466 P.2d 526 (1970).

**B. The Board Found in a Prior Case That Beeler’s Occupational Disease Proximately Caused Permanent Total Disability and the Department Later Found, Independent From This, That His Neck and Knee Claims Also Caused Permanent Total Disability**

Beeler sustained two injuries while working in November 8, 2007: an injury to his knee (that also resulted in a hernia) and an injury to his neck (that also involved a closed head injury). CP 49, 53. The Department allowed both claims and paid benefits.

Beeler also filed a claim for a thumb condition, noting that his “joints in thumbs keep popping out of joint.” CP 51. The Department allowed the thumb claim as an occupational disease rather than as an

industrial injury, and assigned it a date of manifestation of November 26, 2007. CP 72.<sup>2</sup>

The Department closed Beeler's thumb claim with a permanent partial disability award in September 2009. CP 55. Beeler appealed to the Board of Industrial Insurance Appeals (Board), and the Board ruled that Beeler had permanent total disability as of September 21, 2009, as a proximate result of his thumb condition, and ordered the Department to provide Beeler benefits in accordance with that status. CP 60, 61, 64. While Beeler's appeal from the September 2009 closing order was pending at the Board, the Department had paid Beeler temporary total disability benefits under his neck claim and his knee claim, for the period from September 2009 through January 2011. CP 46.<sup>3</sup>

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<sup>2</sup> Beeler erroneously describes his thumb claim as an "injury" throughout his brief (*see* App's Br. at 1, 2, 3, 4, 10, 11, 13), but the Department allowed his claim as an occupational disease, as that order specified that Beeler's had a "date of manifestation" of November 26, 2007. CP 72. Only occupational diseases have dates of manifestation. *See Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 227 883 P.3d 1370 (1995). WAC 296-14-350(2) (defining "date of manifestation" for purpose of adjudicating occupational disease claims).

<sup>3</sup> Beeler erroneously claims that the Department provided him with *permanent partial* disability benefits for his knee and neck injuries at some point during the management of those claims. *See* App's Br. at 3, 7, 8, 10, 11, 13; *but see* App's Br. at 4, 8 (correctly recognizing that Department paid him temporary total disability benefits on knee and neck claim). In fact, the Department provided Beeler with *temporary total* disability benefits for his knee and neck claims but never provided him with permanent partial disability benefits for his knee and neck injuries. *See* CP 46 (stating that Beeler was provided with temporary total disability benefits for his knee and neck injuries while his thumb claim was pending at the Board); CP 184-95 (summarizing the Department orders issued regarding Beeler's neck injury, and not mentioning a finding of permanent partial disability); CP 321-32 (summarizing Department orders issued regarding knee injury, and not mentioning any finding of permanent partial disability).

In ruling that the thumb claim proximately caused Beeler's permanent total disability, the Board commented that the evidence that had been presented by the parties indicated that Beeler was *also* permanently and totally disabled as a result of a separate injury. CP 59. However, the Board explained that, under *Shea*, a worker who is permanently and totally disabled as a result of one injury, and who is also, independently, permanently and totally disabled as a result of a different injury, is properly classified as permanently totally disabled under both claims. CP 59 (citing *Shea*, 12 Wn. App. 410). Therefore, the fact that Beeler was permanently and totally disabled as a result of a different injury did not preclude Beeler from being found to be permanently and totally disabled under his thumb claim. CP 59.

The Department placed Beeler on the pension rolls effective September 2009, as directed by the Board. CP 66.

In February 2011, the Department determined that Beeler's neck injury and his knee injury—independently of his thumb condition—caused him to be permanently and totally disabled. *See* CP 35, 38. Since Beeler was already on a pension at that point, and since all three of his claims led to the same pension benefit calculation, the Department continued to administer Beeler's pension benefits under the thumb claim. CP 46.

Because the Board ordered the Department to grant Beeler pension benefits effective September 2009, and because the Department had paid Beeler temporary total disability benefits for a period beginning on September 2009, Beeler had received duplicate wage replacement benefits in the amount of \$21,493.50. CP 46. Therefore, the Department assessed an overpayment of benefits and informed Beeler that he could either make arrangements to repay that amount or the Department would recoup it from Beeler's ongoing pension benefits. CP 46.

**C. Beeler Presented No Evidence That He Was Permanently Partially Disabled Instead of Permanently Totally Disabled in His Knee and Neck Claim**

Beeler appealed the Department's orders to the Board, seeking permanent partial disability awards for his knee injury and his neck injury. CP 166-68. Beeler moved for summary judgment, but presented no evidence that either his knee injury or his neck injury resulted in permanent partial disability. *See* CP 218-28. Instead, Beeler argued that because the Board had previously entered a decision finding that the thumb condition caused him to be permanently and totally disabled, the Department was precluded from later finding that any of his other injuries resulted in permanent total disability. CP 231-39. The Department cross-moved for summary judgment, arguing that Beeler had no evidence to support his demand. Beeler did not file a reply, nor did he offer additional

evidence in response to the Department's cross-motion, by way of an affidavit or otherwise.

**D. The Board Decided That, Under *Shea*, Beeler Was Permanently and Totally Disabled as a Result of the Separate Injuries, and That Beeler Did Not Rebut That He Was Permanently and Totally Disabled Under Those Claims, and the Trial Court Agreed**

The Board affirmed the Department's decisions, noting that, under *Shea*, a worker can be permanently and totally disabled as a result of separate injuries if each, independently, causes permanent total disability. CP 81, 97-100 (citing *Shea*, 12 Wn. App. 410). Furthermore, since Beeler presented no evidence rebutting the Department's finding that the neck and knee injuries caused permanent and total disability independent of the effects of the thumb claim, the Board concluded that because Beeler had failed to meet his burden of proof, the Department prevailed. CP 97-100.

Beeler appealed to superior court, again arguing that he should receive permanent partial disability awards. CP 1, 16-23. The superior court granted summary judgment to the Department and affirmed both the Board's decision and the Department's orders. CP 73-78.

Beeler then appealed to this Court.

#### IV. STANDARD OF REVIEW

In a workers' compensation case, it is the decision of the trial court that the appellate court reviews, not the Board's decision.<sup>4</sup> *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). In an appeal from a superior court's decision to this Court, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). On review of a summary judgment order, the appellate court's inquiry is the same as the superior courts. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Summary judgment is appropriate if the record shows that there is no genuine issue as to any material fact and a moving party is entitled to judgment as a matter of law. CR 56(c).

The issues in this case turn in part on the proper interpretation of statutes within the Industrial Insurance Act. The proper interpretation of a statute is a question of law, which is reviewed de novo. *State v. Ashby*, 141 Wn. App. 549, 170 P.3d 596 (2007). However, Department's interpretations of the Industrial Insurance Act are entitled to great deference, and the courts "must accord substantial weight to the

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<sup>4</sup> The Administrative Procedures Act does not apply to appeals involving disputes about what benefits an injured worker should receive under the Industrial Insurance Act. *Birgen v. Dep't of Labor & Indus.*, 186 Wn. App. 851, 855-56, 347 P.3d 503 (2015). Rather, the ordinary civil standard of review applies. *Id.*

agenc[ies'] interpretation of the law.” *Littlejohn Constr. Co. v. Dep’t of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994).

## V. ARGUMENT

The superior court properly upheld the Department’s determination that Beeler was rendered permanently and totally disabled by the combined effects of his knee injury and his neck injury, and is therefore ineligible for a permanent partial disability award for either of those injuries, as Beeler presented no evidence that rebutted the Department’s determination he was permanently totally disabled. A worker seeking relief under the Industrial Insurance Act bears the burden of establishing his or her entitlement to benefits. RCW 51.52.050, .115; *Cyr v. Dep’t of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955) (claimants “should be held to strict proof of their right to receive the benefits provided by the act.” (citation omitted)); *Knight v. Dep’t of Labor & Indus.*, 181 Wn. App. 788, 795, 321 P.3d 1275 (2014); *Superior Asphalt & Concrete Co. v. Dep’t of Labor & Indus.*, 19 Wn. App. 800, 804, 578 P.2d 182 (1978). Where a worker has appealed a decision of the Department but has failed to present evidence regarding a necessary element of a claim, the Department’s decision must be upheld. *Knight*, 181 Wn. App. at 801-02. Because Beeler failed to present any evidence supporting his demand for permanent partial disability awards on appeal, the Board and the superior

court properly granted summary judgment to the Department, and this Court should affirm. *Knight*, 181 Wn. App. at 801-02.

**A. Beeler Is Not Entitled to a Permanent Partial Disability Award for Either His Neck or His Knee Injury Because Those Injuries Resulted in Total Rather Than Partial Disability**

**1. Beeler Cannot Prevail in a Claim for Permanent Partial Disability Because He Failed to Present any Evidence That He Has Permanent Partial Disability**

No evidence in this case supports Beeler's argument that he is entitled to a permanent partial disability award for either of his two injuries. *See* App's Br. at 13. When a worker's condition following a workplace injury reaches a fixed or stable point from which further improvement is not expected, the Department is required to close the worker's claim and to make a determination as to what sort of permanent disability, if any, the worker suffered as a proximate result of the injury. RCW 51.32.055; *see Franks*, 35 Wn.2d at 766-67; *Hunter v. Dep't of Labor & Indus.*, 43 Wn.2d 696, 699-701, 263 P.2d 586 (1953). The Industrial Insurance Act provides for two types of permanent disability awards: permanent partial disability and permanent total disability. RCW 51.32.060, .080.

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.*” RCW 51.08.160 (emphasis added). In contrast, RCW 51.08.150 defines permanent partial disability to mean “the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments were severed where repair is not complete, or any other injury known in surgery to be permanent partial disability.” RCW 51.08.150.

As the statutory definitions of permanent partial disability and permanent total disability show, these classifications are mutually exclusive, at least with regard to any given injury. *See Nelson v. Dep’t of Labor & Indus.*, 175 Wn. App. 718, 308 P.3d 686 (2013). For example, if a worker has an injury that results in a loss of function but the worker can still work, the worker is not permanently totally disabled. *Stone*, 172 Wn. App. at 262. But if the loss of function results in the inability to work, this means the worker is totally disabled not partially disabled. *See Nelson*, 175 Wn. App. at 725-26.

Beeler, as a worker who has appealed a decision of the Department, bore the burden of establishing not only that the Department’s decision in this case was erroneous but also that he is entitled to the benefits he seeks on appeal. *See* RCW 51.52.050, .115; *Cyr*, 47 Wn.2d at 97; *Knight*, 181 Wn. App. at 795-96. Beeler failed to meet that burden here because he presented no evidence that he in fact

suffered any permanent partial disability as a result of either his knee injury or his neck injury. *See* CP 218-28. A claim for permanent partial disability must be supported by an opinion from a medical expert, and that expert's opinion must be supported by objective medical findings. *Page v. Dep't of Labor & Indus.*, 52 Wn.2d 706, 708-09, 328 P.2d 663 (1958) (explaining that an award of permanent partial disability must be supported by medical testimony, some of which is based on objective evidence). Beeler presented no opinion from any medical expert that he suffered permanent partial disability as a result of his knee or neck injury. *See* CP 218-28.

Beeler and the Department each moved for summary judgment at both the Board and superior court level. CP 4-15, 16-23, 24-28, 199-204, 231-39. When the Department moves for summary judgment, it bears the initial burden of showing that there is no evidence supporting the worker's appeal. *Knight*, 181 Wn. App. at 795-96; *see Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The Department may do this by noting that the worker has presented no evidence supporting an essential element of his or her appeal. *Knight*, 181 Wn. App. at 795-96; *Young*, 112 Wn.2d at 225. Once the Department makes this showing, "the burden shifts to the plaintiff to make a showing

sufficient to establish the existence of an element essential to his case.”

*Knight*, 181 Wn. App. at 795-96.

Here, Beeler moved for summary judgment at the Board but provided no substantive evidence of any kind regarding the nature of his knee and neck injuries, and he presented no evidence either that those injuries resulted in a loss of function that would support a permanent partial disability award. He also did not provide evidence that the Department erred when it found that those injuries combined to make him unable to work. *See* CP 218-28. The Department argued in its cross motion for summary judgment that Beeler had failed to present any evidence supporting his demand for permanent partial disability, which shifted the burden on to Beeler to establish, in his reply, that there was evidence supporting his appeal. *See* CP 202-03; *Knight*, 181 Wn. App. at 795-96; *Young*, 112 Wn.2d at 225. Beeler did not file a reply and did not submit any additional facts in support of his appeal in response to the Department’s cross motion for summary judgment.

Beeler failed to present any evidence either that the Department erred when it found that he was rendered permanently totally disabled by the combined effects of his knee and neck injuries or that he suffered any permanent partial disability as a result of either the knee or neck injury. *See* CP 218-28. Therefore, he cannot prevail on appeal, and, for that

reason alone, the Board and the superior court properly granted summary judgment to the Department, and this Court should affirm. *See Knight*, 181 Wn. App. at 795-96, 801-02 (holding that where a worker failed to present evidence supporting his or her entitlement to benefits it is proper to grant summary judgment to the Department).<sup>5</sup>

**2. Beeler Failed to Rebut the Department's Finding That His Two Injuries Jointly Caused Permanent and Total Disability Rather Than Permanent and Partial Disability, Which Precludes Him From Receiving Permanent Partial Disability Awards**

In addition to not showing that he developed permanent partial disability, Beeler also failed to rebut the Department's determination that he was rendered permanently totally disabled by the combined effects of his knee and neck injury. *See* CP 218-28. In *Stone*, the Court of Appeals concluded that a worker cannot receive a permanent partial disability award for either of two injuries if both of those injuries combined to proximately cause the worker to have permanent total disability. *Stone*, 172 Wn. App. at 265, 271. Because it was undisputed that the worker had two injuries that jointly caused him to be totally and

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<sup>5</sup> Nor can the remedy be to remand for the development of further evidence. *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969) ("Each party is required to present all of its evidence at the Board level when appealing from an order of the [Department]."); *Salesky v. Dep't of Labor & Indus.*, 42 Wn.2d 483, 484-85, 255 P.2d 896 (1953) (trial court could not remand case to Department to incorporate Department file into Board record and issue new decision); *Ivey v. Dep't of Labor & Indus.*, 4 Wn.2d 162, 163-64, 102 P.2d 683 (1940) (trial court could not remand for new medical evidence).

permanently disabled, the Court concluded that Stone could not receive a permanent partial disability award for either of those two injuries. *Stone*, 172 Wn. App. at 265, 271.

Here, the Department determined that Beeler was unable to work in any capacity, and thus that he was permanently totally disabled, as a proximate result of the combined effects of his knee injury and his neck injury. CP 102-04. Beeler produced no evidence rebutting its finding regarding that issue. CP 218-28. Therefore, Beeler failed to establish that the Department erred when it concluded that he was permanently and totally disabled by the combined effects of his knee and neck injuries. Under *Stone*, Beeler is not entitled to a permanent partial disability award for either his knee or his neck injury because each of those injuries combined to cause him to have permanent total disability. *See Stone*, 172 Wn. App. at 265, 271. (As discussed below in Part V.B., a worker may be permanently totally disabled from one injury (here the thumb) and independently also permanently totally disabled for a separate injury (here the neck and knee). *See infra* Part V.B.)

### **3. *Clauson and McIndoe* Support the Department, Not Beeler**

In the two cases where the Supreme Court held that a worker may receive a permanent partial disability award for one injury and a pension

for another, the Court stressed that the claim for which a permanent partial disability award was sought was unrelated to the worker's status as a permanently and totally disabled worker, which supports that a permanent partial disability award would not be proper when two injuries combine to produce permanent total disability. *See McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 254, 26 P.3d 903 (2001); *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 585-86, 925 P.2d 624 (1996); *see also Stone*, 172 Wn. App. at 266-67 (concluding that *McIndoe* and *Clauson* implicitly support the conclusion that when a worker is permanently totally disabled by the combined effects of two injuries, the worker is not entitled to a permanent partial disability award for either injury). Thus, those cases support the Department's position, not Beeler's. *See McIndoe*, 144 Wn.2d at 254; *Clauson*, 130 Wn.2d at 585-86; *Stone*, 172 Wn. App. at 266-67.

As a starting point, a fact that readily distinguishes Beeler's case from both *Clauson* and *McIndoe* is that Beeler presented no evidence establishing that the injuries for which he seeks permanent partial disability awards produced permanent partial disability. CP 218-28; *see Clauson*, 130 Wn.2d at 583; *McIndoe*, 144 Wn.2d at 254, 255. In both *Clauson* and *McIndoe* it was undisputed that the workers had suffered permanent partial disability as a result of the injuries or occupational

diseases for which they sought permanent partial disability awards.

*Clauson*, 130 Wn.2d at 583 (noting that the injured worker had suffered an increase in permanent partial disability to his right hip, which was the injury for which he sought a permanent partial disability award); *McIndoe*, 144 Wn.2d at 254-55 (noting that case was tried on stipulated facts, which included stipulations that the workers had permanent partial disability as a result of their hearing loss).

Furthermore, there was no contention in either *Clauson* or *McIndoe* that the injury or occupational disease for which a permanent partial disability award was sought was a proximate cause of the workers being incapable of working and thus being permanently and totally disabled. *See Clauson*, 130 Wn.2d at 582-83 (ascribing the worker's permanent total disability to his back injury, not the hip injury for which he sought permanent partial disability); *McIndoe*, 144 Wn.2d at 265 (noting that the workers were totally disabled as a result of their injuries, not as a result of their hearing loss, which occurred before the totally disabling injuries).

Neither *McIndoe* nor *Clauson* support the idea that if a worker is placed on the pension rolls for one claim, this automatically entitles the worker to permanent partial disability awards for all of the other injuries that the worker may have suffered, regardless of whether there is any

evidence that any of the injuries for which permanent partial disability is sought produced permanent partial disability. *See Clauson*, 130 Wn.2d at 583; *McIndoe*, 144 Wn.2d at 254-55. Indeed, no legal authority supports that idea.

Beeler's knee injury and neck injury were each classified as producing total disability, and Beeler failed to rebut that classification. Beeler may not receive a permanent partial disability award for his knee or neck claim because those injuries produced permanent total disability. *See McIndoe*, 144 Wn.2d at 263-64; *see also Stone*, 172 Wn. App. at 265, 271.

**B. Because the Board's Previous Decision Was Limited to the Worker's Thumb Claim, Res Judicata Did Not Preclude the Department From Determining That the Worker's Neck and Knee Claims, Independently of the Thumb Claim, Produced Permanent Total Disability**

The Department determined that Beeler was rendered permanently and totally disabled by the combined effects of his knee injury and his neck injury, and Beeler presented no evidence rebutting that finding. CP 102-04, 218-28. Instead, Beeler argues that the Board's decision in a prior appeal that his thumb condition proximately caused him to be permanently totally disabled prevented the Department from later finding that his injuries caused him to be permanently totally disabled. *See App's Br.* at 11.

However, the Board's finding in the prior case that Beeler was permanently totally disabled as a result of his thumb condition did not preclude the Department from later finding that his neck and knee injuries also, *independently*, caused Beeler to be permanently totally disabled. CP 224. Under *Shea*, a case that Beeler neither cites nor refutes, a worker can be permanently and totally disabled as a result of separate injuries if each injury—independently of the other—produces permanent total disability. 12 Wn. App. at 413-14. Under *Shea*, the Department may find that a given injury proximately caused permanent total disability even if some other injury also, independently, produced permanent total disability. *Id.*

In *Shea*, a worker injured his shoulder in 1964 and his claim was closed two years later with a permanent partial disability award. *Id.* at 411. The worker also had a degenerative vascular condition that was not related to his industrial injury. *Id.* at 412-13. The worker's vascular condition and his industrial injury each got worse over time. *See id.* at 411-13. By 1965, the worker's vascular condition had worsened to the point that it—in and of itself—precluded him from engaging in gainful employment. *Id.* at 412-13. The Department found that the worker's shoulder condition had worsened as of 1970, and it reopened that claim. *See id.* at 411.

The worker sought a permanent total disability award under his shoulder claim, contending that his shoulder condition rendered him incapable of working. *Shea*, 12 Wn. App. at 412. The Department argued that the worker was not entitled to a pension under his shoulder claim as a matter of law because his vascular condition—which was unrelated to his shoulder injury—had already made him completely unable to work as of 1965. *Id.* at 412-13. The Department argued that the worker could not show that his shoulder injury proximately caused him to be unable to work as of 1970 because he had already become permanently unable to work as of 1965 due to his vascular illness. *See Id.*

The *Shea* Court rejected the Department's argument, reasoning that the worker could be permanently totally disabled by his vascular condition and also, independently of the vascular condition, be permanently totally disabled by the shoulder injury. *Id.* at 413-15. The *Shea* Court concluded that if the worker was permanently totally disabled by the shoulder condition independently of the disability related to the vascular condition, then the worker was properly classified as permanently totally disabled under the shoulder claim, notwithstanding the existence of the disability due to the unrelated vascular condition. *Id.*

Here, the Department determined that Beeler's knee injury and his neck injury caused him to be permanently totally disabled, and this was

independent of the effects of his thumb claim. CP 102-04. Beeler mistakenly claims that the Department found that all three of his claims (his neck injury, his knee injury, and his thumb claim) combined to produce permanent total disability, and argues that the Department cannot do that because the Board already determined that the thumb claim caused permanent total disability. *See* App's Br. at 11. However, the Department did not rely on the thumb claim in finding that the knee injury and the neck injury produced permanent total disability: it found that the knee injury and neck injury caused permanent total disability independently of the thumb claim. *See* CP 102-04.

Since the Department did not rely on the thumb claim in finding that Beeler's other claims caused him to be permanently totally disabled, *res judicata* is inapplicable here. There is no contradiction between the Board's finding in the prior case that the thumb condition resulted in permanent total disability and the Department's finding here that the knee and neck injuries independently produced permanent total disability. *See Shea*, 12 Wn. App. at 415 (noting that there is no "genuine inconsistency" between a finding that a worker was permanently totally disabled by a non-industrial condition as of one date and a finding that the worker was also, independently, permanently totally disabled by an industrial injury as of a later date).

Furthermore, the Board did not state in the prior appeal that Beeler's thumb condition was the only condition that caused him to be permanently and totally disabled. *See* CP 224. In fact, the Board commented in that case that the evidence showed that Beeler had another injury, independent of his thumb claim, that *also* rendered him completely incapable of employment. CP 224. Citing *Shea*, the Board concluded that Beeler was properly classified as permanently totally disabled under the thumb claim notwithstanding his other injury because a worker can simultaneously be permanently totally disabled due to separate and distinct injuries where each independently produces permanent total disability. *See* CP 224 (citing *Shea*, 12 Wn. App. 410).

In the current case, the Board, again citing *Shea*, concluded that Beeler was properly classified as permanently totally disabled under his neck and knee injuries because they rendered him permanently totally disabled without taking into account the thumb claim. CP 99 (citing *Shea*, 12 Wn. App. 410).

The Department properly concluded that Beeler is permanently and totally disabled by his knee and neck injuries, because his disability related to those injuries exists independently of his disability related to his thumb claim. The fact that the Board previously found that Beeler's thumb

claim resulted in permanent total disability did not preclude this finding.

*See Shea*, 12 Wn. App. at 413-15. This Court should affirm.

**C. The Department Properly Assessed an Overpayment of Benefits Because Beeler Received Duplicate Wage Replacement Benefits**

The Department properly assessed an overpayment of benefits because Beeler received both permanent total disability benefits and temporary total disability benefits for a period of time that began in 2009 and lasted into 2011.<sup>6</sup> CP 21. RCW 51.32.240(4) authorizes the Department to assess an overpayment if, as a result of an appeal, it is determined that benefits were paid in error. Here, the Department paid Beeler temporary total disability benefits while his appeal from the thumb claim was pending. When the Board ruled that the thumb claim rendered Beeler permanently totally disabled as of 2009, this made all of the temporary total disability benefits that the Department had paid Beeler in the meantime incorrect. Just as permanent total disability and permanent partial disability are mutually exclusive concepts, permanent total

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<sup>6</sup> The Department provided Beeler with temporary total disability benefits from 2009 to 2011 because, at that point, his appeal from the Department's decision to close his thumb claim with a permanent partial disability was pending at the Board, while his knee and neck injury claims remained open.

Beeler claims that the Department created an overpayment by finding that his knee and neck injuries produced permanent total disability. *See App's Br.* at 14. This is incorrect. The overpayment was created because the Department paid Beeler time-loss compensation from 2009 to 2011 while his appeal from the thumb claim was pending, and the Board directed the Department to place Beeler on the pension rolls for the thumb claim effective 2009. An overpayment would exist regardless of whether the Department granted Beeler a permanent partial disability award for the knee and neck injuries.

disability and temporary total disability are mutually exclusive classifications: if a worker's disability is permanent, then, by definition, it is not temporary. *See Franks*, 35 Wn.2d at 766-67. Thus, it is necessarily erroneous to classify a worker as both temporarily and permanently disabled at the same time. *See id.* Furthermore, it would be a windfall for a worker to receive duplicative wage replacement benefits for the same disability period.

Beeler concedes that he has received duplicative wage replacement benefits and he does not argue that he is entitled to retain those duplicative benefits.<sup>7</sup> App's Br. at 8. However, Beeler argues that the Department cannot recoup the overpayment from the pension benefits that he is receiving under his thumb claim, insisting that the Department should only be allowed to recoup the overpayment from his knee and neck claims, and then only if permanent partial disability awards are granted to him under those claims. *See App's Br.* at 8. Beeler asserts that "[t]o take money from

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<sup>7</sup> Beeler has never argued that the Department lacks the authority to recoup an overpayment of benefits from him under RCW 51.32.240(4), and he presents no such argument to this Court. *See App's Br.* at 8. Rather, Beeler argues, without support, that recoupment should only be had if permanent partial disability payments are made. *See App's Br.* at 8. At the Board, Beeler conceded that the Department had the authority to assess an overpayment was correct, noting, "the Department, of course, has the right to deduct any previously paid and duplicative time-loss benefits under Claim No. AG-83408 and Claim No. AF-70814 from any permanent partial disability awards paid under those claims." CP 234. Beeler also acknowledged that the Department had the authority to assess an overpayment at superior court. *See CP 21.* Thus, Beeler has waived any argument regarding whether an overpayment was properly assessed under RCW 51.32.240(4). *See RAP 2.5(a); State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Mr. Beeler's pension would be to rob him of what is rightfully his," suggesting, without analysis, that pension benefits cannot ever be subject to a recoupment regardless of whether an overpayment of benefits occurred. App's Br. at 12.

However, RCW 51.32.240(4) unambiguously provides that when there is an overpayment of benefits as a result of an appeal "recoupment may be made from *any future payments due to the recipient on any claim . . .*" (Emphasis added.) By its plain language, the statute allows the Department to collect an overpayment from any benefits that would otherwise be payable on any of the worker's claims, without limitation. Beeler offers no legal argument as to why the Department would not be able to recoup an overpayment from a worker's pension benefits, when the statute unambiguously authorizes the Department to make recoupment from any future payments on any other claim. *See* App's Br. at 12. Since it is undisputed that Beeler received duplicative wage replacement benefits to which he was not entitled (*see* App's Br. at 8), the Department can properly recoup this overpayment from any other benefits that are payable to Beeler on any other claims, including the monthly pension benefits that he is receiving under his thumb claim. Therefore, this Court should affirm the Department's assessment of an overpayment against Beeler.

**D. Beeler Should Not Receive an Award of Attorney Fees**

The Department properly concluded that Beeler is permanently and totally disabled as a result of his knee and neck injuries, independently of his thumb claim, and it properly assessed an overpayment because Beeler received duplicative wage replacement benefits. Beeler seeks to overturn those decisions and requests an award of attorney fees under RCW 51.52.130. App's Br. at 12-13. This Court should deny his request for attorney fees for two reasons.

First, the Department's decisions in this case should be affirmed. If this Court affirms, then no fee award would be appropriate. *See* RCW 51.52.130.

Second, even if this Court reverses the Department's decision in this case, a fee award would still not be appropriate, because the only remedy Beeler may receive, even if this Court agrees with his arguments, is a remand to the Department to calculate how much, if any, permanent partial disability Beeler has as a result of his two injuries. As this Court held in *Sacred Heart Medical Center v. Knapp*, 172 Wn. App. 26, 29-30, 288 P.3d 675 (2012), a worker is not entitled to an attorney fee award if the only remedy he or she receives on appeal is a remand to the Department for further action rather than an award of benefits.

The plain language of RCW 51.52.130 establishes that an attorney fee award is only granted if a worker obtains additional benefits on appeal which impact the accident fund. RCW 51.52.130 provides:

If in a worker or beneficiary appeal the decision and order of the board is reversed or modified *and if the accident fund or medical aid fund is affected by the litigation*, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained ... the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

(Emphasis added.) *See Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011).

Here, it is Beeler, not the Department, who appealed the Board's decision. Therefore, Beeler may receive an award of attorney fees only if the Board's decision is reversed *and* the accident fund or medical aid fund is affected by the litigation. RCW 51.52.130. A remand for a further decision by the Department, in and of itself, does not impact the accident fund or medical aid fund, and, therefore, merely securing a remand does not make a party entitled to an attorney fee award. *See Knapp*, 172 Wn. App. at 29-30.

Here, Beeler argues that he should receive permanent partial disability awards but he has presented no evidence that he suffered any particular amount of permanent partial disability as a result of either of his

two injuries. App's Br. at 11; CP 218-28. Rather, Beeler's argument is that the Department denied him permanent partial disability benefits on what he claims was an improper basis, namely, its finding that he is permanently and totally disabled as a result of his knee and neck injuries. App's Br. at 11. However, even if this Court concludes that the Department denied Beeler permanent partial disability for an improper reason, it would not follow that Beeler is entitled to an award of a specific amount of permanent partial disability, since, here, he has provided no support whatsoever for any particular award under either of his injury claims. *See* CP 218-28. Thus, the only remedy that would be available here, even if this Court accepts Beeler's arguments, would be a remand to the Department to determine how much, if any, permanent partial disability Beeler has as a result of his two injuries. A remedy of that kind does not warrant a fee award. *See Knapp*, 172 Wn. App. at 29-30.

**E. The Liberal Construction Standard Does Not Assist Beeler Here, as Beeler Has Not Pointed to an Ambiguity in Any Relevant Statute**

Beeler is not entitled to a permanent partial disability award for either of his injuries because he failed to rebut the Department's finding that those two injuries caused him to be permanently and totally disabled. Beeler attempts to bolster his arguments here by citing that the Industrial Insurance Act is subject to liberal construction, with any doubts as to the

meaning of its provisions being resolved in favor of injured workers.

App's Br. at 12.

It is true that the Industrial Insurance Act is subject to liberal construction, but that is of no aid to Beeler here, because Beeler has not pointed to any ambiguity in any statute that is relevant here. The liberal construction standard may be used to construe an ambiguous statute in a manner favorable to workers, but it may not be used to construe a statute in a strained or unreasonable fashion in the interest of reaching a desired outcome. *See Kilian v. Atkinson*, 147 Wn.2d 16, 27, 50 P.3d 638 (2002); *Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 375 (1997). The rule has no applicability to an unambiguous statute, and Beeler has not pointed to any ambiguity in any statute that is relevant in this case. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.3d 1056 (1993); *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n. 28, 286 P.3d 695 (2012).

Furthermore, the case law makes clear that while the provisions of the Industrial Insurance Act are subject to liberal construction, workers are held to strict proof of establishing that they are entitled to the benefits they seek on appeal. *Robinson v. Dep't of Labor & Indus.*, 181 Wn. App. 415, 427, 326 P.3d 744, *review denied*, 337 P.3d 325 (2014); *Cyr*, 47 Wn.2d at 97. Here, Beeler has not met that burden as he has not established that

evidence exists that would support his claim that he should receive permanent partial disability. *See* CP 218-28. The liberal construction standard cannot be invoked to overcome Beeler's failure to support his claim with relevant evidence. *See Robinson*, 181 Wn. App. at 427.

Finally, it should be noted that the rule of law Beeler seeks here, while favorable to him, is not necessarily in the interests of injured workers as a class. Beeler argues that when a worker is placed on the pension rolls under one claim, the worker cannot thereafter be classified as permanently totally disabled under any other claims. App's Br. at 11. While such a rule would help Beeler since he is seeking permanent partial disability awards for his two injury claims, it could be harmful to a worker who has suffered multiple injuries if the worker's pension benefit rate for one of those injuries was higher than the pension rate that applies to the claim under which the worker was first classified as permanently and totally disabled.

When the Department places a worker under a pension for multiple claims, the Department pays the worker's pension benefits out at whichever of the claims has the highest monthly benefit rate. *See* CP 102-04. In Beeler's case, his three claims have the same pension benefit rate, so finding him permanently totally disabled on his two injury claims did not affect his pension benefit rate. *See* CP 102-04. However, in

other cases, there could be a dramatic difference in the monthly pension rate that is applicable to the worker's various claims.<sup>8</sup> In such cases, a worker who has been placed on the pension rolls for one claim might greatly prefer to be classified as permanently and totally disabled under a second claim, rather than receiving a modest permanent partial disability award for it, as, over time, an increase in the monthly pension benefit rate could easily exceed the value of a one-time permanent partial disability award. It would be anomalous to, in the name of liberal construction, adopt a rule of law that would aid some workers but harm many others.

In any event, as Beeler has pointed to no ambiguity in any statute that supports his claim for relief, the liberal construction standard does not assist him here.

## VI. CONCLUSION

The Department properly determined that Beeler may not receive a permanent partial disability award for either of his injuries because those injuries resulted in permanent total disability, not permanent partial disability. Beeler demands permanent partial disability awards on appeal, but he failed to meet his burden of establishing his entitlement to any

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<sup>8</sup> A worker's monthly pension benefit rate is calculated based on a number of factors, including the worker's wages at the time of injury and the worker's marital status and number of dependents at the time of the injury. *See* RCW 51.52.060. Furthermore, a worker's pension benefit rate is adjusted effective July 1 of each year following the date of the worker's injury. *See* RCW 51.32.075.

benefits in this case. Furthermore, when a worker is permanently and totally disabled due to the combined effects of two injuries, as Beeler is here, no permanent partial disability award should be made for either claim. Finally, when a worker has permanent total disability under one claim and is *independently* permanently and totally disabled due to other causes, as Beeler is here, the worker is properly classified as permanently totally disabled under each of those claims, and a permanent partial disability award for an of those injuries is therefore improper. This Court should affirm.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of October, 2015.

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NO. 33316-7-III

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

RONALD H. BEELER,

Appellant,

v.

WASHINGTON STATE  
DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

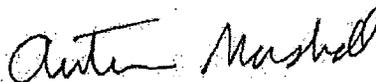
DECLARATION  
OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Brief of Respondent, Department of Labor and Industries and this Declaration of Service to all parties on the record as follows:

**Via Email and First Class U.S. Mail, Postage Prepaid to:**

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DATED this 5<sup>th</sup> day of October, 2015, at Tumwater, Washington.



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