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COURT OF APPEALS NO. 35219-2-II

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

JAMES TOMLINSON,
Petitioner,

v.

PUGET SOUND FREIGHT LINES and DEPARTMENT OF LABOR AND INDUSTRIES FOR THE STATE OF WASHINGTON,
Respondents.

BRIEF OF *AMICUS CURIAE* WASHINGTON SELF INSURED ASSOCIATION

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I. RESTATEMENT OF THE FACTS

WSIA accepts the facts as restated by Puget Sound Freight Lines.

II. ARGUMENT

A. RCW 51.32.080(5)

RCW 51.32.080(5) provides:

> Should a worker receive an injury to a member or part of his or her body already, from whatever cause, permanently partially disabled ["PPD"], resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such worker, his or her compensation for such partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof.

RCW 51.32.080(5)[1] mandates that the worker receive compensation for "PPD" caused by *the* industrial event ["PPD_{AFTER}"], not for "PPD" existing before the industrial event ["PPD_{BEFORE}"]. *E.g., Beyer v. Dep't of Labor & Indus.,* 17 Wn.2d 29, 134 P.2d 948 (1943). Here is the formula for determining "PPD" for which benefits are payable:

$$PPD_{AFTER} - PPD_{BEFORE} = PPD_{BENEFIT}$$

Mr. Tomlinson explores the meaning of "PPD_{BEFORE}." For a summary of his four arguments, see **Appendix A**. In brief, he argues that Mr. Tomlinson's preexisting degenerative joint disease ["DJD"] was not at

[1] See also RCW 51.32.100

"maximum medical improvement" ["MMI"] before the industrial event ["IE"], and so could not have been "PPD_{BEFORE}."

B. Definition of "PPD"

1. Method of Definition

Mr. Tomlinson seeks the meaning (or intension) of the phrase "PPD_{BEFORE}". His approach is analytical.[2] That is, he parses the phrase "PPD" into its constituents and then, after cherry picking definitions of these constituents—specifically the words "permanent" and "disabled" (purportedly in their "plain and ordinary usage")--recombines them, as so defined, to achieve a meaning of the phrase "PPD." Based on his analysis, he concludes that the intension of the phrase "PPD_{BEFORE}" cannot have as one of its extensions a preexisting degeneratively arthritic and impaired knee joint.

WSIA asserts that this approach to defining "PPD" is incorrect. First, the intension of the phrase of "PPD_{BEFORE}" should be the same as that for "PPD_{AFTER}." There is only one kind of "PPD." Hence, the focus of the inquiry should be to determine what "PPD" means *generally* under

[2] "Analysis" is often merely a rhetorical stratagem to confound a more plausible explanation of meaning in that "concepts gain their identity not so much through internal structure as through their place in a larger theory or network of doctrine and practices with which they are associated." S. Blackburn, *Oxford Dictionary of Philosophy* (Oxford, 1996); T. Williamson, *Knowledge and Its Limits*, pps. 31-32 (Oxford, 2000).

the Industrial Insurance Act ["IIA"]. Next, in that context, "PPD" is a term of art.

2. Definition of "PPD"

Contrary to Mr. Tomlinson's argument,[3] the IIA *does* define the phrase "PPD." *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 26 P.3d 903 (2001). In RCW 51.08.150, "PPD" is defined as:

> "Permanent partial disability" is defined as 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.

In RCW 51.32.080(1), "PPD" is defined as follows:

> "...[F]or the permanent partial disabilities here specifically described, ...:
>
> LOSS BY AMPUTATION
>
> Of leg above the knee joint with short thigh stump (3" or less below the tuberosity of ischium) . . . .
> Of leg at or above knee joint with functional stump . . . .
> Of leg below knee joint ...."
> "***."

These definitions of "PPD," by implication, indicate that "PPD" has the following defining characteristics:

(C1) Describes a particular body part;

(C2) The body part is deranged (abnormal);

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[3] See Tomlinson's PFR p. 10 and footnote 12.

(C3) The body is permanently deranged or impaired;

(C4) The derangement is objectively manifest;[4]

(C5) The context does not refer to individual characteristics of a particular worker in relation to his/her environment; and

(C6) A dollar value is associated with the injured or disabled body part.[5]

Some definitions and distinctions need to be fixed before rebuttal of Mr. Tomlinson's arguments.

3. "Impairment" v. "Disability"

The term "disability" is ambiguous. In one sense, as in the phrase "PPD," it means "impairment" or "loss of physical function" as in "any anatomic or functional abnormality or loss." WAC 296-20-19000; *AMA Guides*, p. 601 (5th edition 2001).[6] "PPD" is not concerned with whether that deranged or abnormal body part limits an abstract person's or the particular worker's ability to perform his/her job. *E.g., Kostida v. Dep't of Labor & Indus.*, 139 Wn. 629, 634, 247 P. 1014 (1926); *McIndoe v. Dep't*

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[4] A "PPD" rating must be partly supported by objective findings. *E.g., Cooper v. Dep't of Labor & Indus.*, 20 Wn.2d 429, 147 P. 522 (1944). An objective finding would be an X-ray image. A subjective complaint (symptom) would be pain. *See Hinds v. Johnson*, 55 Wn.2d 325, 327, 347 P.2d 828 (1959); WAC 296-20-220.

[5] "PPD" is rated either as "specified" or as "unspecified." In this case, Mr. Thompson's "PPD" was properly rated as a "specified disability" using the *AMA Guides*. [CABR pps. 8-10 PDO].

[6] "Impairment" is "a loss of use, or derangement of any body part, organ system, or organ function." *AMA Guides*, p. 601 (5th edition 2001).

of Labor & Indus., 144 Wn.2d 252, 26 P.3d 903 (2001); WAC 296-20-19000. For example, if a classical pianist and a truck driver both lose an index finger, both should have the same "PPD." This sense of the term "disability" ["PPD"] will be termed "$DISAB_{INT.}$" See **Appendix E** for a legend of abbreviations.

In another sense, however, as in the phrase "permanent total disability" ["PTD"], the term "disability" means something more than "impairment." It means the effect of an impairment on the worker's ability to work or perform activities of daily living given that worker's physical characteristics, skills and experience in the workplace. *E.g., Ellis v. Dep't of Labor & Indus.,* 88 Wn.2d 844, 851, 567 P.2d 224 (1977); *Frochman v Dep't of Labor & Indus.*, 7 Wn. App. 286, 294, 499 P.2d 255 (1972); *AMA Guides*, p. 600 (5th edition 2001). This sense of the term "disability" will be termed "$DISAB_{EXT.}$"

4. "Impairment" Defined

The definition of the term "impairment" is bipartite.[7] Under WAC 296-20-19000, "$DISAB_{INT}$" is [1] any anatomic or [2] functional abnormality or loss … ." See also WAC 296-20-220 (c) and WAC 296-20-200(4).

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[7] An impairment is a necessary but not a sufficient condition for "PPD."

The *AMA Guides* defines "impairment" ["$DISAB_{INT}$"] as follows:

> [1] "a loss of use, [2] or derangement of any body part, organ system, or organ function." *AMA Guides*, p. 601 (5th edition 2001).
>
> "Loss, loss of use, or derangement implies a change from a normal or 'preexisting' state." "*Normal* is a range or zone representing healthy functioning and varies with age, gender and other factors, such as environmental conditions." *AMA Guides*, p. 2 (5th edition 2001).

"A physical abnormality or derangement of the body part" will be termed "$IMPAIR^{AB}$". "A loss of function or use of the body part" will be termed "$IMPAIR^{LF}$".

5. "Loss of Function or Use" Defined

The phrase "loss of function" is ambiguous. In one sense, it means that an abnormal body part, if not vestigial, functions less well—structurally or physiologically--than a normal/healthy body part functions. For example, an hypertrophic heart functions but it functions less well than an healthy or unenlarged heart. This sense of loss of function will be termed "$IMPAIR^{LF1}$."

In another sense, it means that an abnormal body part produces symptoms that cause a particular worker to limit use of that body part. For example, degenerative joint disease may produce pain in a particular worker that limits her range of motion. This sense of loss of function will

be termed "IMPAIR^{LF2}." In sum, a worker with "IMPAIR^{LF2}" will have "IMPAIR^{LF1}," but a worker with "IMPAIR^{LF1}" will not necessarily have "IMPAIR^{LF2}."

6. "Temporary" vs. "Permanent" Impairment

An "impairment" may be "temporary" or "permanent."[8] The term "permanent" means, by case law, "fixed," "lasting," "stable." *E.g.*, *Summers v. Great S. Life Ins. Co.*, 130 Wn.App. 209, 216, 122 P.3d 195 (2005), *review denied*, 157 Wn.2d 1025, 142 P.3d 609 (2006); *Hiatt v. Dep't of Labor & Indus.*, 48 Wn.2d 843, 297 P.2d 244 (1956).

WAC 296-20-220(b) provides that "'[p]ermanent' describes those conditions which are fixed, lasting and stable, and from which, within the limits of medical probability, further recovery is not expected."

The *AMA Guides* defines "permanent impairment" as "an impairment that has reached maximal medical improvement." *AMA Guides*, p. 602 (5th edition 2001).[9]

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[8] Before "MMI," an injury is a temporary impairment. With time and curative treatment, the injury may heal. At "MMI," an injury may be, if cured, no longer an impairment. At "MMI," an injury may be, if uncured, a permanent impairment. "MMI" is a necessary condition for PPD.

[9] The *AMA Guides* (Sixth Edition) remarks that "[t]his term ["permanency"] is usually synonymous with MMI...." *AMA Guides*, p. 27 (6th edition 2008). Obviously, however, a patient may have reached MMI and have no impairment because treatment has cured the disorder.

7. "Maximum Medical Improvement" Defined

The phrase "maximum medical improvement" ["MMI"] is defined, by case law, as that state at which an abnormal physical condition will not within the near future *significantly* change.[10] *E.g., Miller v. Dep't of Labor & Indus.,* 200 Wn. 674, 680-681, 94 P.2d 764 (1939) ("[R]egardless of any prior reports, there is ample evidence to support the finding of the department that appellant's condition had become fixed, because, without an operation, no improvement could be expected"). See **Appendix C**. As held in *Pybus Steel Co. v. Dep't of Labor & Indus.*, 12 Wn.App. 436, 438-439, 530 P.2d 350 (1975):

> "[T]he term "fixed" does not mean "static." ... "[W]here a claimant's condition is deteriorating or further medical treatment is contemplated, the condition is not "fixed" and the claim remains open so that treatment can be provided." "However, if a claimant's condition has stabilized to the point where no further medical treatment is required, the condition is "fixed" for purposes of closing the claim and determining the disability award."

In the WAC, "MMI" is defined as follows:

> "["MMI"] occurs when no fundamental or marked change in an accepted condition can be expected, with or without

[10] Physical conditions are always changing to some degree through the forces of nature—friction, aging, entropy, *etc.* If "MMI" is attained only with no change, then "MMI" would never be attained. That is why "MMI" is by definition attained when the change is *insignificant*. The term "significant" is vague. That means that borderline cases of *significant* change exist. Whether or not a borderline case is significant change is a matter for the judgment of physicians in the context of their training and experience.

> treatment. *** A worker's condition may have reached maximum medical improvement though it might be expected to improve or deteriorate with the passage of time." "***" WAC 296-20-01002.

The *AMA Guides* defines "MMI" as follows:

> "[A] condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment." "Over time, there may be some change; however, further recovery or deterioration is not anticipated." *AMA Guides*, p. 601 (5th edition 2001).[11]

In sum, "MMI" $=_{\text{df as}}$ "(1) the deranged physical condition has no *medically* significant change in the acute stage of injury, with or without curative treatment or (2) it is chronic, with or without curative treatment."[12] "Whether a particular deranged physical condition at a particular time falls within the extension of this definition (intension) is a matter of medical judgment.

This definition is abstract and so somewhat vague. It is so because it is drawn from medical practice and so reflects the broad biological

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[11] The *AMA Guides*, Sixth Edition, describes "MMI" in a way that captures the apparent import of the case law in Washington:

"Thus, MMI represents a point in time in the recovery process after an injury when further formal medical intervention cannot be expected to improve the underlying impairment. Therefore, MMI is not predicated on the elimination of symptoms and/or subjective complaints." *AMA Guides*, p. 26 (6th edition 2008).

"["MMI"] does not preclude the deterioration of a condition that is expected to occur with the passage of time or as a result of the normal aging process...". *AMA Guides*, p. 26 (6th edition 2008).[11]

[12] If a deranged physical condition is significantly changing *chronically* (cyclically worsening then improving then worsening and so on) but no medical cure is available, the condition is at "MMI."

dimensions of the kinds of abnormal physical conditions addressed in such practice. In short, it is a tool to be used by those whose skilled medical judgment produces pragmatic results in the pursuit of pragmatic goals. It is not a phrase or tool to be used in an overly legalistic way as was the proverbial "pound of flesh" (no more, no less) in Shakespeare's *Merchant of Venice.* It is a term of art, the application of which is based on expert medical judgment.

Typically, all other things being equal, the worker does not want to extend the period in which medical stability is assessed. *Pybus Steel Co. v. Dep't of Labor & Indus.*, 12 Wn.App. 436, 438-439, 530 P.2d 350 (1975) ("This interpretation aids the purpose of the act to provide prompt and certain relief for the injured workman"). For example, if an "IE" causes progressive degenerative disc disease at L_{4-5}, the worker is not apt to want to wait for many years until that disease has progressed to the point that she needs a surgical fusion at L_{4-5} before being declared to have reached "MMI" so that she can receive her "PPD" award.

Claims are not open indefinitely until end stage disease or the worker dies, whichever first occurs. If the deranged physical condition is slowly worsening with the potential to significantly worsen, it will be found to be at "MMI," with the expectation that if the condition does later significantly worsen, the worker will apply to reopen the claim for

additional medical treatment and an increase in "PPD," if warranted. RCW 51.32.160.

Rebuttal

Potential objections about "PPD_{BEFORE}" are of three kinds: normative, technical and conceptual. A "normative" objection would be whether or not the law requires a determination of "PPD_{BEFORE}." By the terms of RCW 51.32.080(5), "PPD_{BEFORE}" must be determined. The industrial event ["IE"] is a designated end point before which "MMI" is to be determined to establish "PPD_{BEFORE}." *See Allen v. Dep't of Labor & Indus.*, 48 Wn.2d at 317-319. Moreover, in that regard, there is no apparent requirement that the Department or Board have acknowledged such "PPD_{BEFORE}" *before* the "IE" in connection with a preexisting "IE." *Allen v. Dep't of Labor & Indus.*, 48 Wn.2d 317, 293 P.2d 391 (1956); *Corak v. Dep't of Labor & Indus.*, 2 Wn.App. 792, 469 P.2d 957 (1970).

A "technical" objection to "PPD_{BEFORE}" would be whether or not medical experts have the ability to assess "PPD" *retrospectively*. Mr. Tomlinson is presumably not arguing that for RCW 51.32.080(5) to apply, a physician had to have rated "PPD_{BEFORE}" before the industrial event ["IE"] because otherwise it would be technically unfeasible to establish "PPD_{BEFORE}." *Allen v. Dep't of Labor & Indus.*, 48 Wn.2d 317, 293 P.2d 391 (1956); *Voshalo v. Dep't of Labor & Indus.*, 75 Wn.2d 43, 449 P.2d

95 (1968). The process of retrospectively assessing "PPD_{BEFORE}" is no more technically difficult than assessing medical causation retrospectively, a feat accomplished daily under the IIA.

A "conceptual" objection to "PPD_{BEFORE}" would be (1) a disagreement over the meaning criteria (or intension) of "PPD" and/or (2) a disagreement over whether those meaning criteria have been satisfied in this case (whether DJD falls within the extension of the term "PPD").

Mr. Tomlinson's objection to "PPD_{BEFORE}" is conceptual, not normative or technical. He disagrees over the meaning of "MMI" (one of the meaning criteria of "PPD") and over whether or not DJD falls within the extension of "MMI," as so defined.

Rebuttal of Argument No. 1, Part One

Mr. Tomlinson argues, at the heart of his appeal, that as long as his preexisting "DJD" is *progressively* worsening, it is not at "MMI," and so, in turn, not "permanent" and so, in turn, not "PPD_{BEFORE}." [Tomlinson's PFR pps. 9-16 and Argument No. 1 in **Appendix A**]. He has roughly characterized "MMI" (or its surrogate expression "permanency") as that stage in the healing process when the abnormal physical condition is unchangeable: "As a matter of law, a bodily condition that is changeable—because its symptoms or effects fluctuate, or because the condition is treatable—is not permanent." [Tomlinson's PFR p. 8].

For a number of reasons, this argument is unsound.

(1) Progressive Condition--No Qualifications

Mr. Tomlinson seeks to read out of the definition of "MMI" anything that modifies the concept "change."

As Mr. Tomlinson modifies the WAC:

> "["MMI"] occurs when no ~~fundamental or marked~~ change in an accepted condition can be expected, with or without treatment. ***~~A worker's condition may have reached maximum medical improvement though it might be expected to improve or deteriorate with the passage of time~~." "***" WAC 296-20-01002.

As Mr. Tomlinson modifies the *AMA Guides*:

> "[A] condition or state that is well stabilized and unlikely to change ~~substantially in the next year~~, with or without medical treatment." "~~Over time, there may be some change; however, further recovery or deterioration is not anticipated~~." *AMA Guides*, p. 601 (5th edition 2001).[13]

So, by his lights, if the physical condition changes *at all,* it is not static, fixed, or stable and so not at "MMI."

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[13] The *AMA Guides*, Sixth Edition, describes "MMI" in a way that captures the apparent import of the case law in Washington:

"Thus, MMI represents a point in time in the recovery process after an injury when further formal medical intervention cannot be expected to improve the underlying impairment. Therefore, MMI is not predicated on the elimination of symptoms and/or subjective complaints." *AMA Guides*, p. 26 (6th edition 2008).

"["MMI"] does not preclude the deterioration of a condition that is expected to occur with the passage of time or as a result of the normal aging process…". *AMA Guides*, p. 26 (6th edition 2008).[13]

(2) Progressive Condition Whether or Not Medical Treatment Needed

Mr. Tomlinson also seeks to read out of the definition of "MMI" that "MMI" is reached where no further medical treatment is required. So, by his lights, if the physical condition is progressive but no further medical treatment is availing to cure that condition, the condition is still not static, fixed, or stable and so not at "MMI." As Mr. Tomlinson modifies the case law:

> "[If] the physical condition has stabilized ~~to the point where no further medical treatment is required~~, the condition is "fixed" for purposes of closing the claim and determining the disability award." *Pybus Steel Co. v. Dep't of Labor & Indus.*, 12 Wn.App. 436, 438-439, 530 P.2d 350 (1975).

(3) Progressive Condition Until End Stage

Making what is implicit in Mr. Tomlinson's enthymematic argument now explicit, by Mr. Tomlinson's lights, as a matter of law, DJD can be at "MMI" only at end stage disease: (1) when there is bone-on-bone contact [complete impairment] or (2) when the degenerative joint is surgically replaced or (3), since DJD is unalterably progressive, when Mr. Tomlinson dies. If Mr. Tomlinson's DJD was not at "MMI" before the "IE" because it was progressing, then after the IE, it would not be at

"MMI" because it is progressing, at least until it reached end stage (bone-on-bone contact) or until the worker dies, whichever first occurs.

But that is not how the phrase "MMI' is used under the IIA. As a matter of medical fact, "DJD," as a slowly worsening condition, can be theoretically at "MMI" at any particular time short of either total impairment or a total knee replacement ["TKR"].[14] In that circumstance, the preponderance of medical evidence would be (1) that the "DJD" is at some percentage of impairment other than 100% and (2) that, at that degree of impairment, a "TKR" is medically unwarranted.

(4) A Matter of Medical Fact, Not of Law

As the AMA Guides provides:

> "Impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur. This will depend on the nature of underlying pathology, as the optimal duration for recovery may vary considerably from days to months." *AMA Guides* p. 24 (6th edition 2008).

Given the meaning (or intention) of "MMI," a physician determines whether a particular physical condition falls within the extension of "MMI." Here, Mr. Tomlinson is requesting this Court to

[14] As a matter of medical fact, "DJD" is at "MMI" because it is "permanent," not temporary; it will never reverse its degenerative course. *See Allen v. Dep't of Labor & Indus.*, 48 Wn.2d 317, 293 P.2d 391 (1956); WAC 296-20-01002(3) ("A worker's condition may have reached maximum medical improvement though it might be expected to improve or deteriorate with the passage of time ***").

hold, as a matter of law, that all cases of degenerative arthritis (all progressive disorders) are incapable of being, by definition, at "MMI." This would be a blanket rule. It would preclude medical inquiry into the medical particularities of any specific worker with degenerative arthritis to determine whether that worker was at "MMI." This request conflicts with this Court's approach to the IIA. *Boeing v. Heidy*, 147 Wn.2d 78, 86, 51 P.3d 793 (2002). There, this Court held:

> "While employers are not required to compensate workers' nonwork-related diseases and injuries, the fact a worker is a certain age is irrelevant to establishing that any portion of his or her injury or disease is not work-related. If it is determined that a worker's disability is work-related and the employer can establish, on an individualized basis, that the full amount or a portion of a worker's disability is not work-related, the employer need not compensate that worker for the portion of the worker's disease or injury that is not work-related."

As a matter of medical fact, Mr. Tomlinson's "DJD" was at "MMI" before the "IE" even though later after the "IE" and because of the "IE," it might not be at "MMI." Because Mr. Tomlinson was at 50% impairment before the IE, he was at end stage (bone-on-bone) before the "IE" and so at "MMI" before the IE. [CABR pps. 10 PDO—Findings of Fact No. 2].

(5) Mr. Tomlinson's Position Conflicts with Washington Cases

Mr. Tomlinson's position, made explicit, conflicts with a long line of cases in Washington. By implication, Mr. Tomlinson's interpretation of the phrase "PPD" is inconsistent with *Miller v. Dep't of Labor & Indus.*, 200 Wn. 674, 680-681, 94 P.2d 764 (1939). There, this Court found that the worker was at "MMI" even though surgery could have cured him.

> The record discloses that the first report was made on the assumption that an operation would be performed, from which the doctors concluded that appellant's condition was not fixed, because, in their opinion, surgical treatment would either rectify or materially improve his condition; while the second report was made upon the assurance that no operation would be had and upon the doctors' belief and decision that the condition was permanent. Moreover, regardless of any prior reports, there is ample evidence to support the finding of the department that appellant's condition had become fixed, because, without an operation, no improvement could be expected.

In a line of cases in Washington, a worker's progressive degenerative arthritis has been found to be at "MMI" even though it has not reached end stage. *E.g., Allen v. Dep't of Labor & Indus.*, 48 Wn.2d 317, 293 P.2d 391 (1956); *see Ziegler v Dep't of Labor & Indus.*, 14 Wn. App. 829, 545 P.2d 558 (1976). See **Appendix B**.

(6) "Sure and Certain Relief"

Mr. Tomlinson's argument, by implication, hinders the goal of the IIA to provide the worker "sure and certain relief." RCW 51.04.010. What is true of the intention of "MMI_{BEFORE}" should be true of the intention of "MMI_{AFTER}." So if "MMI_{BEFORE}" cannot exist (as implied by Mr. Tomlinson) because the DJD is then progressing, "MMI_{AFTER}" cannot exist because the DJD is then progressing, at least until the condition irreversibly reaches total impairment or the joint is replaced, a point that may never occur in the worker's lifetime.

(7) Relevance

That Mr. Tomlinson's "DJD" was progressively worsening before the "IE" is irrelevant because that fact has no practical effect in determining compensation for "PPD_{AFTER}." *See* RCW 51.32.100; *Powers v. Dep't of Labor & Indus.*, 177 Wn. 21, 30 P.2d 983 (1934). That is, the arc of improvement or worsening of the preexisting disease is not charged to "$PPD_{BENEFIT}$."

RCW 51.32.100 provides:

> If it is determined that an injured worker had, at the time of his or her injury, a preexisting disease and that such disease delays or prevents complete recovery from such injury, it shall be ascertained, as nearly as possible, the period over which the injury would have caused disability were it not for the diseased condition and the extent of permanent partial disability which the injury would have

> caused were it not for the disease, and compensation shall be awarded only therefor.

RCW 51.32.100 differs from RCW 51.32.080(5) most strikingly in that the former refers to "*preexisting disease*" ["PED"] as the condition precedent to adjusting "PPD_{AFTER}" and the latter refers to "*permanent partial disability*" ["PPD"] as the condition precedent to adjusting "PPD_{AFTER}." See **Appendix D**. By RCW 51.32.100, the preexisting disease need not have reached "MMI" for it to be a factor in a calculation to reduce the extent of "PPD_{AFTER}" and, accordingly, "$PPD_{BENEFIT}$." By RCW 51.32.100, if the preexisting disease prevents the post-"IE" "condition" from reaching "MMI," "PPD_{AFTER}" is determined by factoring out the effects of the preexisting disease such that the post-"IE" "condition" would be deemed to be at "MMI." By RCW 51.32.100, the formula for determining "$PPD_{BENEFIT}$" is as follows:

$$PPD_{AFTER}{}^{IE+PED} - PPD_{AFTER}{}^{PED} = PPD_{BENEFIT}$$

Rebuttal of Argument No. 1, Part Two

Mr. Tomlinson argues, as a corollary to Part 1 of his Argument No. 1, that because his preexisting "DJD" was curable with a "TKR" after the "IE," it was not "permanent" before the "IE," and so, in turn, was not "PPD_{BEFORE}." [Tomlinson's PFR pps. 9-16 and Argument No. 1 in **Appendix A**].

For the reasons above and these two additional reasons, this argument is unsound.

(1) As a matter of medical fact, a worker's progressively worsening "DJD" can fall within the extension of "MMI" short of reaching the degree of impairment medically warranting a "TKR."

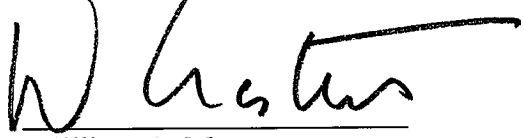
(2) No evidence exists that before the "IE," a "TKR" was a medically recommended treatment for Mr. Tomlinson to cure his "DJD" as it then existed.

III. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be upheld.

Respectfully submitted this 14th day of November 2008.

Wallace, Klor & Mann, P.C.



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APPENDICIES

Appendix A ---------- Mr. Tomlinson's Four Arguments

Appendix B ---------- Case Law Interpreting RCW 51.32.080(5)

Appendix C ---------- Cases Explaining "Maximum Medical Improvement" and "Permanent"

Appendix D ---------- RCW 51.32.100

Appendix E ---------- Legend of Abbreviations

Appendix A

Mr. Tomlinson's Four Arguments

Mr. Tomlinson undertakes to identify the meaning of RCW 51.32.080(5) first by parsing the phrase "permanently partially disabled" ["PPD"] into its constituent parts and then by individually defining these constituents—specifically the words "permanent" and "disabled"—purportedly in their "plain and ordinary usage"—and then by recombining these constituent definitions into the original phrasing to achieve a meaning of the phrase "PPD." He concludes by arguing that the intension of the phrase "PPD" cannot have as one of its extensions a preexisting degeneratively arthritic and impaired joint.

I. DJD Is Not "Permanent"

Major Premise [Warrant]:

RCW 51.32.080(5) applies only to a member or body part that is *permanently* disabled [before the industrial event].

The word "permanent" is not defined in the Industrial Insurance Act.

Therefore, the plain and ordinary meaning of that word should be used. That plain and ordinary meaning is derived from a dictionary, if possible. *McClarty v. Totem Electric*, 1257 Wn.2d 214, 137 P.3d 844 (2006).

Based several Washington appellate cases assessing the meaning of the term "permanent," presumably in its plain and ordinary usage, Mr. Tomlinson concludes that "permanent" means in its plain and ordinary usage:

"Permanent" $=_{\text{df as}}$ "fixed, lasting, stable, and not remediable."

Minor Premise:

Mr. Tomlinson's left knee was not *permanently* degeneratively arthritic before the industrial injury for three reasons:

(1) Mr. Tomlinson's preexisting degenerative arthritis was progressive [*viz.*, steadily and inexorably worsening], and so not fixed and stable.

(2) He had only intermittent symptoms from his preexisting degenerative arthritic left knee.

(3) Mr. Tomlinson's preexisting degenerative arthritic left knee could be cured by replacing it with an artificial knee.

Conclusion:

RCW 51.32.080(5) does not apply to Mr. Tomlinson's preexisting degenerative arthritic left knee.

2. DJD Is Not "Disabling"

Major Premise [Warrant]:

RCW 51.32.080(5) applies only to a member or body part that is permanently *disabled* before the industrial injury.

"Disability" as used in the phrase "PPD" means "impairment"—that is, a loss of function of the body part. In this case, "disability" would mean a loss of some function of the left knee.

Minor Premise:

Mr. Tomlinson's preexisting degenerative arthritic left knee was not *disabling* before the industrial injury because no substantial evidence exists that Mr. Tomlinson's preexisting degenerative arthritic left knee had lost *any* function.

Conclusion:

RCW 51.32.080(5) does not apply to Mr. Tomlinson's preexisting degenerative arthritic left knee.

3. The Disability Is Not from the Same Cause

Major Premise [Warrant]:

RCW 51.32.080(5) applies only to a member or body part that is to some degree permanently *disabled* before the industrial injury and to which the industrial injury increases that degree of permanent disability. [Petitioner's Petition for Review at page 8]

Minor Premise:

After his industrial injury, Mr. Tomlinson became permanently disabled because of his medical treatment for his degenerative arthritis of his left knee; that is, solely because of his total knee replacement, not because of any preexisting degenerative arthritis in his left knee.

Conclusion:

RCW 51.32.080(5) does not apply to Mr. Tomlinson's preexisting degenerative arthritic left knee.

4. Aggravation of a Preexisting Non-Disabling Condition

Major Premise [Warrant]:

"Where an industrial injury aggravates a preexisting condition *that was not already permanently partially disabling*, and the aggravation results in a permanent disability, the employer is responsible for the whole disability." [Emphasis supplied.] *Miller v. Dep't of Labor & Indus.*, 200 Wn. 674, 680-681, 94 P.2d 764 (1939).

Minor Premise:

Mr. Tomlinson had a preexisting degeneratively arthritic left knee that was not permanently disabling before the industrial injury.

Conclusion:

RCW 51.32.080(5) does not apply to Mr. Tomlinson's preexisting degenerative arthritic left knee.

Appendix B

Case Law Interpreting RCW 51.32.080(5)

Rehberger v. Dep't of Labor & Indus., 154 Wn. 659, 283 P. 185 (1929). In this case, in 1918, in Canada, the worker had an industrial injury to his right leg for which he received a PPD award for a 70% impairment. In 1927, while on the job in Washington, the worker again injured his right leg for which he received an impairment rating of 15.6 degrees. Under [RCW 51.32.080(5)], in determining the amount of the PPD award, the Department subtracted the amount of PPD awarded for the earlier industrial injury. The worker introduced evidence that the 1918 injury had not limited his activities or lessened his earning power. And so, he argued, the Department should not have deducted the prior PPD award from his present awardable PPD on the basis that the current industrial injury aggravated and lit up a latent or dormant condition left by the prior injury. The Department argued that, having been earlier paid for a 70 % PPD, the worker had only thirty per cent left to lose on his leg upon his 1929 industrial injury. The WSC held that the evidence was sufficient to go to the jury that current industrial injury aggravated and lit up a latent or dormant condition left by the prior injury.

Elliot v. Dep't of Labor & Indus., 187 Wn. 656, 61 P.2d 291 (1936), *modified* 188 Wn. 703, 62 P.2d 1343 (1936), *reversed in part in Miller v. Dep't of Labor & Indus.*, 200 Wn. 674, 94 P.2d 764 (1939). In this case, in 1931, while at work, the worker sprained his back. He had a congenital malformation of the spine which made it subject to sprain. The Department determined he had 1 degree of impairment. Before the claim closed, the worker had successful back surgery. As a result, his back was in better condition than it

was before the accident. The worker argued that he was entitled to his medical expenses because the industrial injury lit up a dormant arthritic condition. The WSC held that this rule did not apply because after the surgery, the worker had a better back than he had when born. "The accident having lit up the dormant condition, the worker was entitled to IIA benefits based upon his previous condition [lit up by the "IE"], and not upon the theory that he was entitled to be placed in a better physical condition than he was at the time of the accident." The WSC noted that the claim was prematurely closed because the worker's had not become fixed. The WSC held that [RCW 51.32.080(5)] gives the Department the authority to determine, in the exercise of its judgment or discretion, to what extent the disability was due to the previous weakness of the back, and to what extent it was due to the injury. "The question ... is subject to reasonable determination by the opinion of physicians and surgeons, especially the two that examined him prior to the operation, one of whom performed the operation."

Miller v. Dep't of Labor & Indus., 200 Wn. 674, 94 P.2d 764 (1939). In this case, the WSC held: "We are of the view that [RCW 51.32.080(5)] is applicable only to cases in which the workman already is, *in fact,* permanently partially disabled within the meaning of the workmen's compensation act, but that it does not apply when the preexisting weakened or congenital condition, independent of the subsequent injury, has not, in any way, incapacitated the workman or has not, of itself, constituted a disability."

Beyer v. Dep't of Labor & Indus., 17 Wn.2d 29, 134 P.2d 948 (1943). In this case, in 1935, in an industrial injury, the worker lost the sight in his right eye. He did not file an

industrial injury claim. In 1941, he again injured his right eye, requiring its removal. For that injury, he filed an industrial injury claim. He was awarded the difference between the PPD for lost sight in the right eye ($1,080) and PPD for the removal of the right eye ($1,440). Dissatisfied, he appealed to the trial court. The trial court found him entitled to the PPD for removal of the right eye ($1,440) without offset. The Department appealed. The WSC held that under RCW 51.32.080(5), the correct PPD award is the difference between the PPD for lost sight in the right ($1,080) and PPD for the removal of the eye ($1,440).

Allen v. Dep't of Labor & Indus., 48 Wn.2d 317, 293 P.2d 391 (1956). In this case, the worker suffered a low back injury not covered by IIA, resulting in degenerative arthritis. Thereafter, he continued to work and, in another job, covered by IIA, again injured his low back. The trial court awarded him 30% PPD. The worker's expert testified that the worker had a 30% impairment of his low back and attributed 20% of the PPD to his age and preexisting arthritis and the remaining 10% to the industrial injury. The Department appealed. The WSC held that under RCW 51.32.080(5), "there is no testimony in the record upon which more than 10% of that disability is attributable to the injury in question."

Enevold v. Dep't of Labor & Indus., 51 Wn.2d 648, 320 P.2d 1096 (1958). In this case, before the industrial injury, the worker had a spastic condition, from which he was PPD. While at work, he suffered an injury to his back that produced an additional PPD. The BIIA awarded him 45% of the maximum allowable for an unspecified disability. The

trial court and the WSC upheld that PPD award. In light of RCW 51.32.080(5), the worker's medical expert was unable to segregate and apportion the amount of PPD attributable to the worker's pre-existing spastic condition and his back injury. The Department's medical experts rated his PPD at 45% of the maximum for an unspecified disability. One such expert testified:

> "Q. If you were to base your award on loss of physical function such as is encountered by a man who actually loses a limb by amputation, based upon that form of rating and assuming 100% permanent partial disability still means partial disability, based upon that standard what would your rating be of Mr. Enevold's disability? [Colloquy] A. I would rate him as I have."

Another expert testified:

> "Q. Doctor, if we assume that a person who is 100% permanently partially disabled, that he can still be gainfully employed in some gainful occupation as distinguished from permanent and total disability, would that change your rating which you arrived at at the time of your examination with Dr. Wallace? A. No."

The worker argued these methods of rating his degree of unspecified disability were improper because they were related to total disability instead of a partial disability. The WSC disagreed,

> If total disability means one hundred per cent disability, partial disability must be some percentage of disability smaller than one hundred per cent. There is, of course, a dividing line between total and partial disabilities, but like a geometric line without width, it need not be by a margin of any particular percentage. It follows that the per cent of unspecified disability, which the doctors fixed, would be the same whether related to total disability or a partial disability barely over the line from total disability, which was designated in this case as one hundred per cent partial disability.

Voshalo v. Dep't of Labor & Indus., 75 Wn.2d 43, 449 P.2d 95 (1968). In this case, the worker injured his left arm at work in May 1964 but for that injury was awarded no PPD. He continued to work and injured his left arm again at work in July 1964. He was awarded PPD of 10% for the left arm. The trial court awarded him 30% PPD for the left arm. The Department appealed. The WSC held that under RCW 51.32.080(5), the worker was entitled to only 10% PPD for the left arm. The worker's expert testified that the worker had 50% disability in his left arm, but of that 50% disability, 10% was due to the industrial injuries, with the remainder attributable to preexisting arthritis in the left arm and shoulder.

Ringhouse v. Dep't of Labor & Indus., 2 Wn. App. 814, 470 P.2d 232 (1970) [Division I]. In this case, in 1937 in a non-industrial accident, the worker lost his left thumb, index, middle and ring fingers. In 1965, in an industrial accident, he lost his left little finger. He was awarded PPD of 75% of the remaining amputation value of the left minor hand at the wrist, plus an amount equivalent to the amputation value of one-half of he second phalanx, left minor, little finger of the left minor hand. The remaining value was calculated by subtracting from the 1965 value of the whole hand, the 1965 value of the thumb, index, middle and ring fingers. The trial court ruled that the value of the fingers lost in the 1937 accident should be based on 1937 values, not 1965 values. The Department appealed. The WCA held that the trial court erred, remarking,

> "Both parties agree that RCW 51.32.080 (4) [RCW 51.32.080(5)] applies and requires that the previous disability (the 1937 loss of the thumb, index, middle, and ring fingers) be considered in determining the degree or extent of the increase in such permanent partial disability. The test for determining the extent of permanent partial disability is the loss of bodily function. In order to determine how much physical function was lost due to Ringhouse's 1937 non-industrial accident, it is necessary

> to determine how much physical function he had at the time of the 1965 industrial injury. This is called "remaining value." The prior disability must be subtracted from the two combined disabilities in order to determine the extent of the disability due to the industrial injury." [Citations omitted.]

Corak v. Dep't of Labor & Indus., 2 Wn.App. 792, 469 P.2d 957 (1970). In this case, in 1952, while at work, the worker sustained an injury to his low back. For this, he received a PPD award of 15% of the maximum allowed for unspecified disabilities. In 1965, he reinjured his low back. He was awarded PPD of 10% of the maximum allowed for unspecified disabilities. The BIIA, on appeal, awarded 40% of the maximum allowed for unspecified disabilities, less the monetary amount paid for the 1952 injury. On appeal, the trial court combined the disabilities resulting from both the 1965 and the 1952 injuries, as did the BIIA, but increased the disability award to 50% of the maximum allowed for unspecified disabilities, and deducted the monetary amount paid to the claimant for his 1952 injuries. The Department appealed, arguing that the trial court should have determined the percentage of PPD attributable to the second injury only and base its increased award thereon, rather than to combine the PPDs from both injuries and deduct from the total, the previously received monetary award. The WSC agreed with the Department.

> "By its terms, [RCW 51.32.080(5)] the "increased disability" section of the statute differs from the "combined effects" section [RCW 51.32.120] in that the former does not apply to situations where there is no prior disability involving the same member or part of the body. It differs also in that its application is specifically limited to permanent *partial* disability situations involving aggravation or increase in such permanent partial disability. Also, the "increased disability" section applies only to cases in which the workman is already, in fact, permanently partially disabled within the meaning of the workman's compensation act, but it does not

apply to determine the disability attributable solely to an injury where the trauma activated a latent congenital weakness not previously disabling. *Miller v. Department of Labor & Indus.,* 200 Wash. 674, 94 P.2d 764 (1939).

The "increased disability" section was applied in *Beyer v. Department of Labor & Indus.,* 17 Wn.2d 29, 31, 134 P.2d 948 (1943), to require a workman's previous disability resulting from the loss of the sight of his eye to be considered in fixing his compensation for a subsequent injury to the same eye requiring its removal. In *Beyer,* the department awarded for this second injury the difference between the specified amount for loss of the sight of one eye and the specified amount for the loss of an eye by enucleation. The trial court reversed and awarded the workman $ 1,440, which was the entire amount specified for the loss of an eye by enucleation. On appeal, the Supreme Court reversed the trial court and held that the department had correctly determined the award by applying the "increased disability" section, and said:

> "This, we think, applies to the situation before us. In July, 1941, respondent received an injury to his eye. He had already been permanently partially disabled in 1935, and this second injury resulted in the removal of the eye, but not in his permanent total disability. The statute appears to direct the department to fix his compensation for the second injury with regard to the previous disability. It would seem that, if the department had allowed the claimant $ 1,440, it would have completely disregarded that direction."

The rationale of *Beyer* was followed in *Allen v. Department of Labor & Indus.,* 48 Wn.2d 317, 318, 293 P.2d 391 (1956), which construed the "increased disability" section to require the extent of permanent partial disability to be determined on the basis of the percentage of the disability attributable to the injury in question. The court stated:

> 'There is no testimony in the record upon which more than ten per cent of that disability is attributable to the injury in question. The statute in question requires the reversal of the trial court for the reason that the record does not sustain a finding of thirty-per-cent disability *which can be attributed to the injury in question.*'

> Claimant contended that these cases are not controlling, because none of them involves a preexisting disability resulting from an industrial accident involving a lump sum payment. This argument may be answered by again quoting the "increased disability" section of the statute which makes it applicable to the injuries to a part of the body "receive[d] . . . already, from *whatever cause,* . . ." ... The department argues that when the legislature used the phrase, "from whatever cause," it could not have meant only from nonindustrial causes, for this does violence to the plain meaning of the language used in the statute. We agree. If the legislature intended this narrow, restricted meaning, it chose in the phrase, "from whatever cause," the broadest possible language in order to express it. There is no reason to believe that the phrase was intended to mean anything other than what it states.
>
> Sound reason and uniformity require that there be a segregation, so that the workman is compensated for the disability attributable to the injury in question alone. To accomplish this, it is necessary to make a factual determination as to the percentage of permanent partial disability [claimant] sustained which is attributable solely to the 1965 injury. The medical evidence most favorable to [claimant] was given by his witness, Dr. Thomas, who indicated on direct examination that, in his opinion, [claimant's] disability amounted to 65 per cent of the unspecified, but he did not attempt to apportion the disability due to each of the injuries. Dr. Thomas' testimony is sufficient to sustain the trial court's finding that [claimant] was suffering from a 50 per cent disability. There is no finding apportioning the disability due to each of the injuries. However, [claimant] was awarded 15 per cent of the maximum allowed for unspecified disabilities for his 1952 injury, and such order was not appealed from, and is res judicata. The simple mathematics of the situation dictate an award of 35 per cent of the maximum allowed for unspecified disabilities. The cause is remanded to the trial court to modify its judgment and findings, and to direct the department to pay the respondent 35 per cent of the maximum allowed for unspecified disabilities, less 10 per cent previously paid under the claim.

Orr v. Dep't of Labor & Indus., 10 Wn. App. 697, 519 P.2d 1334 (1974) [Division II].

In this case, while at work, the worker injured his low back twice in 1955. He filed a claim but no PPD was awarded. In 1968, he re-injured his low back at work. He was awarded no PPD for his low back injury. He appealed to the trial court, contending he

should have a 100% PPD rating for his low back. The trial court refused to submit a PPD instruction to the jury. The worker appealed. The WCA held that the trial court did not err in failing to so instruct the jury on PPD because none of the expert witnesses had segregated the preexisting disability from the current disability as required by RCW 51.32.080(5). The worker had argued that no segregation was appropriate because the 1968 injury lit up a latent or dormant preexisting condition and that under *Miller v Dep't of Labor & Indus.*, 200 Wn. 674, 94 P.2d 764 (1939), the resulting disability is to be attributed to the injury, not to the preexisting physical condition. The Court disagreed, finding ample evidence in the record that the worker's preexisting condition was not dormant.

As the WCA said,

> "The weakened or congenital condition in question in this case was an additional or sixth lumbar vertebra. Over the years it has caused claimant's sacrum to attempt to become part of his spine. The disc interspace above this additional vertebra is practically obliterated. The cartilage at that level is damaged. The result is a restriction in the degree to which claimant's low back can bend forward. If this is congenital anomaly and its resulting degenerative changes, or any other condition in his low back, did not permanently and manifestly diminish the claimant's utilization of his natural faculties, which may of course include interference with his working capacity, prior to the 1968 injury, it would not have been proper to require a segregation of that preexisting condition as a prior "permanent partial disability" within the contemplation of RCW 51.32.080(3) [RCW 51.32.080(5)]."
> ***
> "Claimant's low back problems restricted the type of work he could perform prior to his 1968 injury. In 1967, after he had been off work for an unrelated injury, the Washington State Highway Department informed him that he could no longer drive heavy equipment. However, the Highway Department offered him a job as a gardener. Claimant could not accept the offer, according to his testimony, because "my legs and back just wouldn't let me do that. I had to refuse." His leg problems referred to in that statement were caused by other injuries and are unrelated to this discussion.

> Claimant's counsel argues that Dr. Dille attributed all of the low back disability to the injury in 1968 and rated it at 100 percent of the unspecified permanent partial disability. A careful reading of all of the testimony of Dr. Dille, however, demonstrates that he rated the workman's entire back condition from whatever cause as he found it in his examination on January 18, 1971. Mr. Orr acknowledged that prior to the 1968 injury he had continuing symptoms in his low back which in some ways incapacitated him. It is clear that his condition was not dormant, inactive or quiescent. It therefore became incumbent upon claimant's doctor to segregate the preexisting disability from the disabling condition he found in claimant's back at the time of his examination in 1971."

Ziegler v Dep't of Labor & Indus., 14 Wn. App. 829, 545 P.2d 558 (1976) [Division III]. In this case, the worker had an industrial injury to his low back. The claim was closed with a PPD award for the low back. Several years later, the worker applied to reopen the claim for an aggravation to his low back. The BIIA determined that the worsening was due to the natural progression of preexisting degenerative arthritis unrelated to the earlier industrial injury. The worker appealed. At the trial court, the jury awarded the worker an increase in PPD. The employer appealed. The WCA held that the evidence was insufficient to submit the issue of PPD to the jury because no expert had segregated the amount of disability from the industrial injury from the disability from the preexisting degenerative arthritis as required by RCW 51.32.080(5).

Bennett v. Dep't of Labor & Indus., 95 Wn.2d 531, 627 P.2d 104 (1981). In this case, in Oregon in 1959, the worker had an industrial low back injury, involving three surgeries, including a laminectomy. The worker then returned to work as a carpenter. In 1973, in Washington, he re-injured his low back. He received a 20% PPD award. He appealed and a jury awarded him 60% PPD. The Department appealed, arguing that the trial court

should not have given the jury a *Miller* instruction. The WSC held that based on the evidence a *Miller* instruction was appropriate. As the WSC noted,

> "Here, the petitioner's attending physician, the only medical witness produced at the hearing before the Board, testified that the previous injuries and surgeries had produced a residual weakness in the petitioner's back, putting him more "at risk" of injury than one who had not experienced such a history. He also testified that the 1973 injury lighted up the petitioner's symptoms. He was unable to say from objective findings whether there had been pain or other symptoms prior to the 1973 injury and was forced to rely upon the patient's history. The petitioner had advised the doctor that, prior to the accident, he had experienced some weakness in his left leg. This weakness apparently was not disabling, since according to the testimony of the petitioner and that of his foreman, he had been able to perform all the heavy duties of a carpenter on an industrial project without noticeable difficulty. The medical witness gave his opinion that the petitioner's disability, which he rated at 60 percent, was due to the 1973 injury and to his preexisting back condition. When pressed to allocate the disability between the two causes, he attributed 40 percent to the preexisting condition and 20 percent to the 1973 injury. It was upon this allocation that the Court of Appeals reversed the judgment on the verdict. We find that the court erred in that holding. While the doctor attributed the larger part of the petitioner's disability to his back weakness at the time of the accident, he never testified that that weakness had been disabling prior to the 1973 injury. He agreed that the disability was precipitated by the 1973 injury. Upon this evidence, including the lay testimony that there was little or no disability prior to the injury, the jury was justified in finding that the petitioner, at the time of the 1973 injury, was suffering from a preexisting weakness, rendering him more susceptible to injury than others, but that for a number of years prior to that event, it had not been disabling. Accordingly, the extent of the petitioner's disability having been established by the medical testimony, the finding of the jury that the entire disability resulted from the 1973 injury was supported by the evidence and should have been sustained."

N.B. This holding is ill reasoned. The evidence was that the worker had an impairment in the sense of an abnormal body part ["IMPAIR^{AB}"] in his back. By history, he had objective findings of an abnormality or derangement of a body part. The evidence was

that the worker also had an impairment in the sense of a loss of function ["$IMPAIR^{LF}$"] in his back from weakness owing to the abnormal body part. The WSC appears to hold that because the worker did not have a disability in performing his job ["$DISAB_{EXT}$"], he did not have "PPD_{BEFORE}" and so RCW 51.32.080(5) did not apply. But the analysis under RCW 51.32.080(5) does not require that the "impairment" result in "$DISAB_{EXT}$." Moreover, the WSC acknowledged that before the 1973 injury, the worker had "little or no disability." If the worker had a "little disability" [in the sense of some "$DISAB_{INT}$"], then RCW 51.32.080(5) should apply.

Dennis v. Dep't of Labor & Indus., 109 Wn.2 467, 745 P.2d 1295 (1987). In this case, the WSC discussed its interpretation of RCW 51.32.080(5) and RCW 51.32.100.

> "*** However, our decision has at its heart the requirement that the worker's disabled condition must be work related, and thus our decision comports with the Industrial Insurance Act. *See* RCW 51.04.010 (governing the remedy of workers "for injuries received in employment"); RCW 51.12.010 (declaring the policy of liberal construction "for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment"); RCW 51.32.180 and RCW 51.08.140 (requiring that compensable disability from occupational disease must arise out of employment).
> ***
> ..[T]he Department ... suggests that where a preexisting disease condition was symptomatic, compensation is not awardable for disability resulting from aggravation of that disease. *** As noted, we have held that where an injury lights up a quiescent or latent preexisting disease or weakened condition, resulting disability is attributable to the injury. *See, e.g., Harbor Plywood Corp. v. Department of Labor & Indus.*, 48 Wn.2d 553, 295 P.2d 310 (1956). We have also recognized, however, that a different rule applies where a worker is already permanently partially disabled within the meaning of the Act; in such a case RCW 51.32.080(3) applies. That section requires segregation of the preexisting disability, from whatever cause, and limits the award for any disability resulting from a later injury. *Bennett v. Department of*

Labor & Indus., 95 Wn.2d 531, 532-33, 627 P.2d 104 (1981). *See also* RCW 51.32.100 (setting forth segregation rule where preexisting disease delays or prevents recovery); *Allen v. Department of Labor & Indus.*, 48 Wn.2d 317, 293 P.2d 391 (1956) (in which segregation rule applied). Where a claimant establishes a disease-based disability arising naturally and proximately out of employment, we are inclined to view the "symptomatic-asymptomatic" issue in terms of whether segregation rules apply, rather than to perceive a bar to any award if a preexisting disease was symptomatic prior to work-related aggravation of that disease.
In any event, we need not resolve the "symptomatic-asymptomatic" issue in this case because the uncontroverted medical testimony established that the osteoarthritis in Dennis' wrists became symptomatic and disabling as a result of repetitive tin snipping. While the osteoarthritis manifested itself elsewhere in Dennis' body, we are here concerned only with the disabled condition of his wrists and the medical testimony respecting that condition."

Weyerhaeuser v. Tri, 117 Wn.2d 128, 814 P.2d 629 (1991). In that case, the WSC, in *dicta*, distinguished RCW 51.32.080(5) from RCW 51.32.100.

"Washington statutes allow for segregation of prior disabilities in determining the amount of compensation due an injured worker.

RCW 51.32.080(3) provides:
Should a worker receive an injury to a member or part of his or her body already . . . permanently partially disabled, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such worker, his or her compensation for such partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof.

That provision directs the Department to consider and segregate the extent of the previous disability when fixing the amount of the compensation due for the second injury. *Beyer v. Department of Labor & Indus.*, 17 Wn.2d 29, 31, 134 P.2d 948, 137 P.2d 1016 (1943); *Corak v. Department of Labor & Indus.*, 2 Wn. App. 792, 801, 469 P.2d 957 (1970).

RCW 51.32.100 provides:

> If it is determined that an injured worker had, at the time of his or her injury, a preexisting disease and that such disease delays or prevents complete recovery from such injury, it shall be ascertained . . . the period over which the injury would have caused disability were it not for the diseased condition and the extent of permanent partial disability which the injury would have caused were it not for the disease, and compensation shall be awarded only therefor.
>
> On its face RCW 51.32.100 relates only to setting the amount of compensation. Neither it nor RCW 51.32.080(3) explicitly addresses the question of who is liable for that compensation. Furthermore, each statute deals only with injuries; neither addresses occupational diseases."

Boeing v. Hansen, 97 Wn.App. 553, 985 P.2d 421 (1999) [Division I]. In this case, the worker had pre-existing non-industrial low back injury that necessitated a laminectomy. Four years later, while working for Boeing, he sustained another low back injury, resulting in a herniated disc. He had surgery to repair the disc and returned to work with daily low back pain. His physical condition was rated as a "unspecified disability." It was rated as a category 3 PPD. Boeing, in an effort to reduce the PPD award, attempted to prove, through a neurologist, that the worker's pre-existing low back injury would have also been a category 3 PPD. Boeing's expert, a neurologist, merely testified that because the worker had had a laminectomy from the preexisting low back injury, he was a category 3 PPD before the workplace injury. The WCA held that Boeing's proof was insufficient. It said, "[t]o establish a preexisting category 3 permanent dorso-lumbar and/or impairment, Boeing must present evidence of (1) a mild low back 'impairment' [defined as a loss of physical function] and (2) mild continuous or moderate intermittent objective clinical findings of such impairment" [as required in WAC 296-20-280(3):

> "(3) Mild low back impairment, with mild continuous or moderate intermittent objective clinical findings of such impairment but without significant X-ray findings or significant objective motor loss."]

"An impairment is evaluated without reference to the nature of the injury or the treatment therefore, but is based on the functional loss due to the injury… ." Boeing's expert, the court opined, should have connected (1) whatever preexisting objective clinical findings of low back abnormality existed before the workplace injury with (2) whatever preexisting loss of function existed before the workplace injury.

The WCA remarked,

> "To establish a preexisting category 3 permanent dorso-lumbar and/or lumbosacral impairment, Boeing must present evidence of (1) a mild low back impairment, and (2) mild continuous or moderate intermittent objective clinical findings of such impairment. WAC 296-20-280(3). The Washington Administrative Code (WAC) defines an impairment as "a loss of physical or mental function." WAC 296-20-220(1)(c). The WAC further clarifies that an "impairment is evaluated *without reference to the nature of injury or the treatment* therefore, but is based on the functional loss due to the injury or occupational disease." WAC 296-20-200(4). The goal of the WAC category system is to allow workers with comparable loss of function to receive comparable awards. "***" While "[e]xaminations for the determination of the *extent* of permanent bodily impairment shall be made only by doctors currently licensed in medicine and surgery," the doctor must first diagnose any conditions not attributable to the industrial injury and describe "how they affect the person examined and the appropriate category of permanent impairment where possible." Thus, even if evidence of a laminectomy constitutes an objective clinical finding of impairment, a laminectomy alone is insufficient to establish a category 3 dorso-lumbar and/or lumbosacral impairment in fact where the doctor fails to connect [1] that objective clinical finding with [2] an actual loss of physical function. Dr. Murphy's conclusion that Hansen suffered from a degenerative disk disease was based solely on the fact that Hansen had undergone a laminectomy in 1986 and that Hansen had visited a chiropractor following that surgery. Dr. Murphy acknowledged, however, that Hansen had not seen a chiropractor for over a year before the accident. And he further acknowledged that he did not know anything about Hansen's chiropractic visits other than the fact that Hansen did indeed see a chiropractor. Dr. Murphy must establish the existence of an impairment based on Hansen's loss of function. Without a link between a physical abnormality and an actual loss

of function, objective clinical evidence showing the existence of an abnormality is immaterial. Dr. Murphy's testimony does describe Hansen's physical function at the time of the industrial injury. And the record does not sufficiently show an actual preexisting impairment at all. The only evidence before the court showed that Hansen returned to his job in 1986 and, after six weeks, performed his duties without restriction for four years until the 1990 accident."

Appendix C

Cases Explaining "Maximum Medical Improvement" and "Permanent"

Luke v. Dep't of Labor & Indus., 147 Wn.149, 265 P. 176 (1928). In this case, the WSC remarked:

> "Q. Now, Doctor, we have kind of hemmed and hawed here about this fixed condition. You said on direct examination or on your first cross-examination that in your opinion the condition was fixed as of that date, of October 1st. Then when counsel took you again you said that you felt that it was not fixed. Let me understand if I get you. That in your opinion on October 1st the condition was fixed so far as getting worse was concerned, but it was not fixed so far as possible relief was concerned? A. That was my meaning."
>
> "Here we have a complete agreement with the evidence of the department upon a theory which we think is binding upon the courts. We are not here concerned with the degree of permanent partial disability--that is not now in issue--but simply with the question of whether the extent of the disability having become fixed, so far as growing worse is concerned, a change to a permanent disability classification is proper. Subdivision h of § 7679, Rem. Comp. Stat., [P. C. § 3472], clearly provides for re-classification upon changed conditions being made known, and necessarily what may in the beginning be a total temporary disability may eventuate into a permanent disability, either total or partial."

Miller v. Dep't of Labor & Indus., 200 Wn. 674, 680-681, 94 P.2d 764 (1939). In *Miller*, the WSC found that the worker was at "MMI" even though an operation could have eliminated the loss of function.

> The record discloses that the first report was made on the assumption that an operation would be performed, from which the doctors concluded that appellant's condition was not fixed, because, in their opinion, surgical treatment would either rectify or materially improve his condition; while the second report was made upon the assurance that no operation would be had and upon the doctors' belief and decision that the condition was permanent. Moreover, regardless of any prior reports, there is ample evidence to support the finding of the department that

> appellant's condition had become fixed, because, without an operation, no improvement could be expected. Appellant's condition having become fixed, it was necessary for the department to determine whether the disability was total or partial. Upon that question, the evidence abundantly supports the finding that the fixed condition was one of permanent partial disability.

State ex. rel. Stone v. Olinger, 6 Wn.2d 643, 108 P.2d 630 (1940). In this case, the WSC remarked, "[b]efore an allowance can properly be made for a permanent partial disability, the condition of the injured workman must have reached a fixed state."

Franks v. Dep't of Labor & Indus., 35 Wn.2d 763, 215 P.2d 416 (1950). In this case, the WSC remarked that: "[p]ermanent partial disability ... contemplates a situation where the condition of the injured workman has reached a fixed state from which full recovery is not expected."

Hiatt v. Dep't of Labor & Indus., 48 Wn.2d 843, 297 P.2d 244 (1956). In this case, the WSC defines "permanent total disability" ["PTD"].

> RCW 51.08.160 defines "permanent total disability" within the meaning of the workman's compensation act: "'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 workman from performing any work at any gainful occupation." In *Standard Oil Co. of Indiana v. Sullivan*, 33 Wyo. 223, 237 P. 253, the supreme court of Wyoming, in discussing a statute identical in language with the above, stated: "Except in the cases of permanent total disability that are specifically described in the statute, we believe a total disability should not be declared to be permanent unless it appears pretty clearly that the affliction will not yield to treatment, and that the workman will never be able to work at 'any gainful occupation.'" In *Franks v. Department of Labor & Industries*, 35 Wn.2d 763, 215 P.2d 416, we stated: "Usually, during a period of temporary total disability, the workman is undergoing treatment. In any event, such

> classification contemplates that eventually there will be either complete recovery or an impaired bodily condition which is static. Until one or the other of these conditions is reached, the statutory classification is temporary total disability. Permanent partial disability, on the other hand, contemplates a situation where the condition of the injured workman has reached a fixed state from which full recovery is not expected. *Miller v. Department of Labor & Industries*, 200 Wn. 674, 94 P.2d 764."
>
> "***"
>
> "The use of the word "permanent" together with "disability" indicates the character of the disability. It signifies that the disability has expectedly an unchangeable existence; that the physical condition arising from the injury is fixed, lasting, and stable. A person whose condition is remediable is not permanently disabled. "***" "At the time of decedent's death, he was not permanently totally disabled as a result of his injury. His condition was not fixed, lasting, or stable. His disability would have continued for only four to six months longer, except for the intervention of death. His condition resulting from the injury was temporary rather than permanent."

Wilson v. Dep't of Labor & Indus., 6 Wn. App. 902, 496 P.2d 551 (1972). In this case, the WCA defined "permanent total disability" ["PTD"].

> "Chapter 51.08 of the Industrial Insurance Act defines both "permanent partial disability" and "permanent total disability." The definitions, in effect, make a distinction between temporary and permanent partial disability, and temporary and permanent total disability. The word "permanent" characterizes partial disability in one case and total disability in the other. The statutory definition of the phrase "permanent total disability" makes it plain that the condition described includes not only the specific conditions listed, but also "other condition permanently incapacitating the workman from performing any work at any gainful occupation." The thrust of the definition is the permanence of the condition of total disability. Therefore, "A person whose condition is remediable is not permanently disabled." *** For total disability to be permanent, it is necessary that "the physical condition arising from the injury [be] fixed, lasting, and stable." *** The conclusion reached is similar to that reached elsewhere. Thus, as pointed out in 11 W. Schneider, Workmen's Compensation § 2307(a), at 411-12 (3d ed. 1957): Except in cases of permanent total disability that are specially described in the statute, "a total disability should not be declared to be permanent unless it appears pretty clearly that the affliction will not yield to treatment, and that the workman will never be able to work at any gainful occupation."

Pybus Steel Co. v. Dep't of Labor & Indus., 12 Wn.App. 436, 438-439, 530 P.2d 350 (1975). In this case, the WCA said,

> "The term "fixed" is not in the statutory definition of permanent, partial disability (RCW 51.08.150), but is a judicially imposed condition". *** "[T]he term "fixed" does not mean "static." It is clear that where a claimant's condition is deteriorating or further medical treatment is contemplated, the condition is not "fixed" and the claim remains open so that treatment can be provided. However, if a claimant's condition has stabilized to the point where no further medical treatment is required, the condition is "fixed" for purposes of closing the claim and determining the disability award. This interpretation aids the purpose of the act to provide prompt and certain relief for the injured workman. RCW 51.04.010." "Dr. Rankin testified ... "there is ... no medical treatment that will predictably alter his course."

Williams v. Virginia Mason Med. Ctr., 75 Wn.App. 582, 880 P.2d 539 (1975). In this case, the WCA sought to define "PPD" and "PTD." The worker objected to the following jury instruction because it contained a misstatement of the law, and was confusing and prejudicial:

> If a worker's condition is such that she would otherwise be totally disabled, but through reasonable effort she is retrainable so that she could perform gainful employment, then you are instructed such disability is not permanent.

The workers claims that "permanent" and "temporary" refer only to whether the claimant's medical condition is fixed and stable, and not to the worker's ability to engage in gainful employment. She argues that "total" and "partial" address the worker's ability or inability to work, and that therefore the last word of instruction 12 should have been "total" rather than "permanent". The WCA agreed that the instruction confuses these terms of art.

> Permanent partial disability has been defined in case law as a partial incapacity to work as measured by loss of bodily function. *Dowell v. Department of Labor & Indus.,* 51 Wn.2d 428, 433, 319 P.2d 843 (1957); *Cayce v. Department of Labor & Indus.,* 2 Wn. App. 315, 316, 467 P.2d 879 (1970). Permanent total disability is the inability to work at any gainful occupation. *Dowell,* 51 Wn.2d at 433. Both concepts involve the loss of working ability due to an industrial injury or condition which is "permanent", that is, an injury or condition which is fixed, lasting, stable, and not remediable. *Hiatt v. Department of Labor & Indus.,* 48 Wn.2d 843, 846, 297 P.2d 244 (1956). The concepts differ, however, insofar as they refer to the claimant's ability to engage in gainful employment. If the claimant cannot engage in any gainful employment, the permanent disability is total; if she can engage in some type of gainful employment on a reasonably continuous basis notwithstanding her medical condition, the permanent disability is partial. Instruction 12, however, addressed a claimant's ability to engage in gainful employment in terms of whether the disability was permanent or temporary. As discussed, the permanent/temporary distinction goes to the issue of whether the claimant's medical condition was fixed and stable, or remediable. To be consistent with the statutory and case law definitions, the last word of the instruction should have been "total" rather than "permanent".

Shea v. Dep't of Labor & Indus., 12 Wn.App. 410, 415, 529 P.2d 1131 (1974), *review denied*, 85 Wn.2d 1009 (1975). In this case, the WCA sought to define "permanent total disability" ["PTD"]. The worker had filed a claim for an industrial injury in 1964 that caused him to become unemployable in 1971. He also had an unrelated degenerative vascular disease that caused him to become unemployable in 1965. There was no synergy between these two separate conditions. The Department argued that because the worker was *permanently* totally disabled in 1965 because of non-industrially caused condition, he cannot thereafter also have become *permanently* totally disabled because of the 1964 industrial injury. That is, the 1964 industrial injury cannot possibly be the proximate cause of the worker's total disability. The WCA found for the worker:

> It is a fundamental principle of workmen's compensation acts that if the injury complained of is a proximate cause of the *disability* for which compensation is sought, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting weakness. *Miller v. Department of Labor & Indus.,* 200 Wash. 674, 94 P.2d 764 (1939); *Fochtman v. Department of Labor & Indus., supra.*
>
> In this jurisdiction, when disability crosses the line from partial to total, the essential standard applied by the physician or other expert who evaluates the workman is converted from "loss of bodily function" to "loss of earning power." *Franks v. Department of Labor & Indus.,* 35 Wn. 2d 763, 215 P.2d 416 (1950). Thus, theoretically at least, a concert pianist, a typist, a butcher, and a second loader on a logging show all suffer the same statutory measure of partial disability from a given injury which produces a given measure of partial loss of use of a finger. However, when measuring the effect of that injury in terms of total disability, a whole host of other circumstances and possible contributing factors must be considered. *Fochtman v. Department of Labor & Indus., supra.*
>
> When the disabling condition proximately caused by an injury is no longer remedial and its character has expectedly an unchangeable existence, the resultant disability is said to be permanent. *Hiatt v. Department of Labor & Indus.,* 48 Wn.2d 843, 297 P.2d 244 (1956). When the totality and permanency coalesce, the individual is said to be totally and permanently disabled, and when those qualities coalesce and an industrial injury is a significantly contributing cause of the resultant inability to perform reasonably obtainable work suitable to his qualifications and training, regardless of the other causes, the workman is entitled to pension benefits under the workmen's compensation act.

Summers v. Great S. Life Ins. Co., 130 Wn.App. 209, 216, 122 P.3d 195 (2005), *review denied*, 157 Wn.2d 1025, 142 P.3d 609 (2006). In this case, the WCA sought to interpret a policy of disability insurance. Plaintiff was declared ineligible to perform the material duties of a commercial pilot. What was at issue was whether this ineligibility was "permanent" within the meaning set forth in Great Southern's policy. The WCA remarked:

"...[A]s used in the policy at issue here, "permanent" is a term of common understanding; it is not ambiguous. Under the definition put forth in *Richards* and other cases, "permanent" refers to "a state of indefinite continuance, . . . something incapable of alteration, fixed, or immutable." 1C John Alan Appelman & Jean Appleman, Insurance Law and Practice § 641, at 206 (1981). Under this definition, "it must appear that the disability will probably continue for the remainder of the insured's life." APPLEMAN, *supra,* § 641, at 206; *see also* Black's Law Dictionary 1139 (6th ed. 1990) (defining "permanent disability" as "one which will remain substantially the same during remainder of worker's compensation claimant's life. . . . Within insurance policies, does not mean that disability must continue throughout life of the insured, but it connotes idea that disability must be something more than temporary, and at least presumably permanent").

NB: This case should have no bearing on an interpretation of RCW 51.32.080(5).

Appendix D

RCW 51.32.100

RCW 51.32.100 provides:

> If it is determined that an injured worker had, at the time of his or her injury, a preexisting disease and that such disease delays or prevents complete recovery from such injury, [then] it shall be ascertained . . . the period over which the injury would have caused disability were it not for the diseased condition and the extent of permanent partial disability which the injury would have caused were it not for the disease, and compensation shall be awarded only therefor.

This statute is concerned with two categories of industrial insurance ["II"] benefits: (1) TTD/PTD and (2) PPD. Analytically, the statute is parsed as follows:

[1] [TTD/PTD/PPD]: Existence of Preexisting Disease.
The worker had a preexisting disease ["PED"] at the time of the industrial event ["IE"].

[2] [TTD/PTD]: Such Preexisting Disease Delays Recovery from "IE."
If the preexisting disease delays complete recovery from the industrial injury,

[3] [TTD/PPD]: Or such Preexisting Disease Prevents Recovery from "IE."
Or if the preexisting disease prevents complete recovery from the industrial injury,

[4] [TTD/PTD]: Ascertain Period Over Which "IE" Would Have Caused Disability w/o Preexisting Disease
Then ascertain the period over which the industrial injury would have caused disability if no preexisting disease.

[5] [PPD]: Ascertain Extent of "PPD" "IE" Caused w/o Preexisting Disease.
Ascertain the extent of "PPD" if no preexisting disease.

[6] [PPD/TTD/PTD]: Compensate for Only for What "IE" Caused w/o Preexisting Disease.
Compensate worker only for TTD/PTD or for "PPD" factoring out the effects of preexisting disease.

(1) RCW 51.32.100 differs from RCW 51.32.080(5), most strikingly, in that the former refers to "*preexisting disease*" ["PED"] as the condition precedent to adjusting "PPD_{AFTER}" and the latter statute refers to "*permanent partial disability*" ["PPD"] as the condition precedent to adjusting "PPD_{AFTER}."

(2) By RCW 51.32.100, the preexisting disease need not have reached "MMI" for it to be a factor in a calculation to reduce the extent of "PPD_{AFTER}" and, accordingly, "$PPD_{BENEFIT}$."

(3) By RCW 51.32.100, if the preexisting disease prevents the post-"IE" "impairment" from reaching "MMI," "PPD_{AFTER}" is determined by factoring out the effects of the preexisting disease such that the post-"IE" "impairment" would be deemed at "MMI."

(4) So by RCW 51.32.100, the formula for determining "$PPD_{BENEFIT}$" is as follows:

$$\text{“}PPD_{AFTER}{}^{IE+PED}\text{”} - \text{“}PPD_{AFTER}{}^{PED}\text{”} = \text{“}PPD_{BENEFIT}\text{”}$$

"$PPD_{AFTER}{}^{PED}$" is a function of the variable "PED." Given that, whether "PED" is improving or worsening before "IE" matters not because "$PPD_{AFTER}{}^{PED}$" is factored out the equation in determining "$PPD_{BENEFIT}$."

(5) Item (4) conflicts with *Miller* to the extent that the preexisting disease was asymptomatic. The statute should trump *Miller v. Dep't of Labor & Indus.,* 200 Wn. 674, 94 P.2d 764 (1939).

Powers v. Dep't of Labor & Indus., 177 Wn. 21, 30 P.2d 983 (1934). In this case, the WSC discussed RCW 51.32.100. The worker filed an industrial insurance claim, which the Department and the BIIA rejected but which the trial court allowed, remanding to the

Department "to rate the claimant ... for disability compensation for the injury received on June 10th, 1931, as totally disabled for a period of twelve days following the accident ... and thereafter as a permanent partial disability to the knee ... ."

An independent medical examiner then reported that the worker "suffered from pre-existing arthritis due to a former injury, saying: "Were it not for this pre-existing arthritis due to the former injury and his generalized systemic condition, time loss necessitated by the strain of [the IE] would not have extended beyond twelve days and PPD due to the accident would not be in excess of four (4) degrees." The Department allowed the worker twelve days time loss for total disability, and assigned a PPD rating of four degrees, or $120.

The worker then, instead of appealing to the BIIA, filed a petition for show cause with the trial court, alleging that the Department had failed to rate and pay him pursuant to the judgment, and had failed to allow him sufficient PPD for his knee. The trial court entered an order directing the Department to re-rate the worker for his injury, 'without taking into consideration any pre-existing arthritis due to any former injury.' The Department was then directed to rate the worker for PPD to the knee. Presumably, this rating was to be determined under the terms of Subdivision *(1)*, of section 7679, Rem. Rev. Stat. [RCW 51.32.100]. Under that statute, the Department, in fixing the rate of PPD, was required to take into account the pre-existing arthritis from a former injury. The WSC concluded that "the order of the trial court directing the re-rating of respondent without taking into account this pre-existing condition was in excess of its power."

The WSC further concluded that "the original judgment should be read as requiring no more than that the department entertain respondent's claim and award him such compensation as he was found entitled to on account of his injury."

Miller v. Dep't of Labor & Indus., 200 Wn. 674, 94 P.2d 764 (1939). In this case, the WSC does not specifically refer to RCW 51.32.100, but it held: "We are of the view that [RCW 51.32.080(5)] is applicable only to cases in which the workman already is, *in fact,* permanently partially disabled within the meaning of the workmen's compensation act, but that it does not apply when the preexisting weakened or congenital condition, independent of the subsequent injury, has not, in any way, incapacitated the workman or has not, of itself, constituted a disability."

NB: To the extent *Miller* contradicts the plain terms of RCW 51.32.100, it is in derogation of that statute.

Weyerhaeuser v. Tri, 117 Wn.2d 128, 814 P.2d 629 (1991). In this case, the WSC distinguished RCW 51.32.080(5) from RCW 51.32.100 in *dicta.*

> "Washington statutes allow for segregation of prior disabilities in determining the amount of compensation due an injured worker.
>
> [RCW 51.32.080(5)] directs the Department to consider and segregate the extent of the previous disability when fixing the amount of the compensation due for the second injury. *Beyer v. Department of Labor & Indus.*, 17 Wn.2d 29, 31, 134 P.2d 948, 137 P.2d 1016 (1943); *Corak v. Department of Labor & Indus.*, 2 Wn. App. 792, 801, 469 P.2d 957 (1970).
>
> On its face, RCW 51.32.100 relates only to setting the amount of compensation.

NB: This *dicta* does not appear consistent with the plain terms of the statute. It also appears inconsistent with *Ashenbrenner v. Dep't of Labor & Indus.*, 62 Wn.2d 22, 380 P.2d 730 (1963) (Absent legislative language clearly requiring the retrospective application of a particular statute, compensation must be fixed in accordance with the compensation statute in effect at the time of the injury). What this case appears to instruct is the following: First, offset levels of impairment and, next, assign a dollar value based on the current statutory scheme of compensation to the resulting net impairment.

Boeing v. Heidy, 147 Wn.2d 78, 51 P.3d 793 (2002). In this case, the WSC addressed the issue whether an occupational disease could be segregated from a nonoccupational disease presumably under RCW 51.32.100.

The worker suffered occupational noise related hearing loss ("NRHL") and age-related hearing loss ("ARHL") (presbycusis). The Department ordered the respective employer's to pay a PPD award for 100 percent of the workers' hearing loss. The employer argued in favor of segregating ARHL from NRHL by using a median-based allocation method.

$$\text{“}PPD_{AFTER}{}^{NRHL + ARHL}\text{”} - \text{“}PPD_{AFTER}{}^{ARHL}\text{”} = \text{“}PPD_{BENEFIT}{}^{NRHL}\text{”}$$

The trial court held segregation was forbidden as a matter of law under *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 814 P.2d 629 (1991). The WSC disagreed; it held that *Tri* was not controlling because it addressed the issue of apportioning worker's compensation risk between successive employers or insurers, not the issue of segregating an occupational disease from a nonoccupational disease.

The employer argued that ARHL should be segregated from NRHL based on a "median-based allocation method" derived from epidemiological data. As the employer's expert explained:

> You basically look at the amount of [hearing] loss to be expected for that individual, given his age, and look at the amount of loss to be expected from what you know about the noise exposure ... . You then say, in my judgment, the fairest allocation is the one that is in proportion to those two; that if a group of people working in 90 dBA for 40 years ended up having three quarters of their loss at age 60 being age-related and a quarter of it being noise induced, that that's a proper division of responsibility for the individual who's 60 years old and worked for 40 years in that noise exposure.

The WSC held "that a worker's age is irrelevant to establishing the existence and extent of a worker's disability, and the median-based allocation method cannot be used to refute the existence or extent of an individual's disability."

> "This [median-based allocation] method does not assist a doctor in determining the actual extent to which *an individual* suffers from ARHL. At best, it allows a doctor to compare an individual's age and hearing loss percentage to a smoothed-data chart based on information not intended to be used to assess individuals. The doctor can then "norm" the individual's actual hearing loss percentage so that it reflects the median amount of ARHL expected by a person of that age."
>
> "While employers are not required to compensate workers' nonwork-related diseases and injuries, the fact a worker is a certain age is irrelevant to establishing that any portion of his or her injury or disease is not work-related. If it is determined that a worker's disability is work-related and the employer can establish, on an individualized basis, that the full amount or a portion of a worker's disability is not work-related, the employer need not compensate that worker for the portion of the worker's disease or injury that is not work-related."

Appendix E

Legend of Abbreviations

Symbol	Meaning
ADL	Activities of daily living
DJD	Degenerative joint disease
$DISAB_{EXT}$	Inability to perform job and/or activities of daily living
$DISAB_{INT}$	Impairment without reference to job or activities of daily living
IE	Industrial event causing industrial injury
II	Industrial injury
IIA	Industrial Insurance Act
$IMPAIR^{AB}$	Impairment from abnormal body part
$IMPAIR^{LF}$	Impairment from loss of function of body part
$IMPAIR^{LF1}$	Body part loss of function by deviating from normal
$IMPAIR^{LF2}$	Body part loss of function from symptoms
$IMPAIR^{PED}$	Impairment from preexisting disease
MMI	Maximum medical improvement
MMI_{AFTER}	Maximum medical improvement after the industrial event
MMI_{BEFORE}	Maximum medical improvement before the industrial event
PED	Preexisting disease
PPD	Permanent partial disability
PPD_{AFTER}	PPD after the industrial event
PPD_{BEFORE}	PPD before the industrial event
$PPD_{AFTER}{}^{IE}$	PPD after the IE caused solely by the industrial event
$PPD_{AFTER}{}^{PED}$	PPD after the IE caused solely by preexisting disease
$PPD_{AFTER}{}^{IE+PED}$	PPD after the IE caused by the conjunction of IE and the preexisting disease
$PPD_{BENEFIT}$	PPD from which the worker's award will be calculated
PTD	Permanent total disability
TKR	Total knee replacement