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Supreme Court No. \_\_\_\_\_ STATE OF WASHINGTON

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Court of Appeals No. 35219-2-II DEPUTY

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SUPREME COURT FOR THE STATE OF WASHINGTON

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JAMES TOMLINSON, *Appellant*,

v.

PUGET SOUND FREIGHTLINES and DEPARTMENT  
OF LABOR & INDUSTRIES, *Respondents*.

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TOMLINSON'S PETITION FOR REVIEW

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ORIGINAL

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**A. Identity of Petitioner**

The petitioner is James Tomlinson – an injured worker seeking benefits under the Industrial Insurance Act, Title 51 RCW (“the Act”).

**B. Citation to Court of Appeals Decision**

*James Tomlinson v. Puget Sound Freightlines and the Department of Labor & Industries of the State of Washington*, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2007 Wash. App. LEXIS 2657 (Ct. App. September 18, 2007) (published opinion).

**C. Issue Presented for Review**

Did the Court of Appeals – in a decision of first impression, and wide effect – misinterpret RCW 51.32.080(5), by construing arthritis as “permanent partial disability” under that statute, when under settled law the arthritis was (1) not fixed and stable, so not permanent, and (2) not restricting function, so not disabling.

**D. Statement of the Case**

As the Court of Appeals accurately summarized, Tomlinson fell down a flight of stairs at work, striking his left knee as he fell. For many years before then he had had arthritis – by definition, degenerative changes shown by x-rays – in both knees. Occasionally the arthritis caused pain, or pain and stiffness. However, at the time of injury he had not seen a doctor for left knee symptoms in four years, and the arthritis did not prevent him

from working, or otherwise restrict leg function.

The fall aggravated the arthritis. Tomlinson underwent various treatments (medications, rest, physical therapy, and epidural steroid injections), then “total knee replacement” (“TKR”). TKR replaced the arthritic natural knee with a prosthetic joint (TKR).<sup>1</sup> In so doing, the arthritis was removed.<sup>2</sup>

The TKR failed. Another surgery followed, and then a repeat TKR. The final outcome was poor. Nothing more could be done, and treatment stopped.

All that remained to do was determine a permanent partial disability benefit (“PPD”) and close the claim. Determination of PPD involves two steps: physicians determine whether the condition of the injured body part<sup>3</sup> is, in fact, permanent, and if so, the extent of permanent impairment, if any; then the Department applies the law to the medical

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<sup>1</sup> Dr. Jiganti testified that knee replacement surgery involves “[r]eplacing the bones on either side of knee joint, the femur and the tibia, thigh bone and shin bone, with metal on the ends of the bones, then a plastic insert goes in between the two...” Dr. Smith testified that in total knee replacement surgery arthritis is removed, bone surfaces and worn cartilage are replaced with metal and plastic, and the joint space is returned to that of a healthy, normal knee). Dr. Chaplin testified that after knee replacement surgery Tomlinson no longer had arthritis, because “there is no longer a [natural] joint and there is nothing in that joint that now could get arthritis.”

<sup>2</sup> *Id.*

<sup>3</sup> Here, the “leg above the knee joint with short thigh stump (3” or less below tuberosity of ischum.” RCW 51.32.080(1)(a).

facts to determine the permanent partial disability benefit.<sup>4</sup>

PSFL chose Drs. Smith and Dr. Chaplin to examine Tomlinson for that purpose. They testified that Tomlinson had *75 percent* permanent impairment of the leg, *due solely and entirely to poor outcome from TKR*. In other words, the long-gone arthritis contributed nothing to the 75 percent. Tomlinson's attending orthopedic surgeon, Dr. John Jiganti, concurred. PSFL accepted the rating. So did the Department.

PSFL asked Drs. Chaplin and Smith how much impairment Tomlinson *would* have had at the time of injury, if the arthritis had been permanent and disabling then. They answered, 50 percent. Citing RCW 51.32.080(5), the Department ordered PPD of 25 percent of the leg (75 percent impairment less 50 percent impairment equals 25 percent disability). At the Board, the doctors testified to the effect that the basis for their opinion was the arthritis shown by x-ray. (As a matter of law, addressed below, arthritis alone does not establish disability under the Act.)

PPD for extremities, including knees, is based on the *Guides to the Evaluation of Permanent Impairment* published by the American Medical Association (the *Guides*). Under the *Guides*, as under the Act, permanent

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<sup>4</sup> See *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d at 265, and *Brannan v. Dep't of Labor & Indus.*, 104 Wn.2d 55, 56, 700 P.2d 1139 (1985).

impairment cannot be determined until the medical condition at issue has become fixed and stable.<sup>5</sup> Also under the *Guides*, PPD after TKR is based solely and entirely on a recipient's functioning with the prosthetic joint; there is no deduction for arthritis that TKR removed. (In fact, the *Guides* direct that impairment be determined by different methods for arthritis and for TKR, and that the methods not be combined or mixed.) Drs. Chaplin and Smith testified that before Tomlinson fell down the stairs, he knee was *not* fixed and stable. The main symptom of the arthritis – pain – occurred only episodically, and both the arthritis and its symptoms were treatable. (It was not *being* treated, because Tomlinson did not feel the need; but it could have been treated as it had been before, by medications, rest, and/or physical therapy, and as it was treated subsequently, by TKR). Dr. Smith testified that in none of the preinjury medical records PSFL gave him did any physician state an opinion that Tomlinson had permanent impairment under the Act.<sup>6</sup>

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<sup>5</sup> The *Guides* says:

**An impairment is considered permanent when it has reached maximum medical improvement (MMI), meaning it is well stabilized and unlikely to change** substantially in the next year **with or without medical treatment**. The term *impairment* in the *Guides* refers to **permanent** impairment, which is the focus of the *Guides*[,]

(Emphasis added.)

<sup>6</sup> In 1992, the Veterans Administration determined him to have some permanent disability of *both* knees. However, the criteria therefor are not in evidence. Moreover, "The right to workers' compensation benefits is statutory, and a court will look to the provisions of *the Act* to determine whether a particular worker is entitled to compensation." *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996) *See also, Brand v. Dep't of Labor & Indus.*, 139

**E. Argument Why Review Should Be Accepted**

**1. Factors governing review**

Mr. Tomlinson seeks review under the “substantial public interest” provision of RAP 13.4(b). A decision involves substantial public interest if (1) its subject is of public rather than private nature; (2) an authoritative determination is desirable to provide future guidance to public officers; and (3) the issue is likely to recur. *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 911 P.3d 389 (1996).

The Act was enacted for a public purpose. *See* RCW 51.04.010;<sup>7</sup> *see also*, RCW 51.12.010.<sup>8</sup> *See also Duskin v. Carlson*, 136 Wn.2d 550, 557, 965 P.2d 611 (1998) (the Act is a plan of “social insurance”).

Accordingly, its proper application necessarily involves the public interest.

An authoritative ruling is needed because the *Tomlinson* holding –

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Wn.2d 659, 668, 989 P.2d 1111 (1999) (the “industrial Insurance Act is a self-contained system that provides specific procedures and remedies for injured workers”).

<sup>7</sup> In whole, but particularly this passage:

...The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy...

<sup>8</sup> The statute provides:

There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

This title shall be liberally construed 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.

that unstable, treatable, nondisabling arthritis is permanent partial disability under RCW 51.32.080(5) – conflicts with numerous other appellate decisions which guide determination of permanence and disability.. *Tomlinson* casts a pall of confusion over what had long been a fairly clear, prompt, and predictable process for determination of PPD.

Finally, *Tomlinson* is not merely likely, but certain, to affect many other cases. The decision will intrude in virtually every Title 51 TKR case, and further, in the vast majority of PPD claims that involve joints (*i.e.*, the entire spine, fingers, hands, elbows, shoulders, hips, knees, feet, and toes).

Just in regard to TKR, as noted above the Department has adopted the *Guides* as the basis for rating permanent partial disabilities of the knee, and *Guides* criteria for quantifying permanent impairment after TKR make no deduction for arthritis. In every one of those cases, *Tomlinson* will reduce permanent partial disability benefits, or eliminate them altogether.<sup>9</sup> In regard to other joints, arthritis to varying degrees in everyone as part of aging; *Tomlinson* opens the door to claims for subsection (5) application in the vast majority of PPD claims. This will lead to many partially disabled

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<sup>9</sup> Under the *Guides*, TKR outcomes are classified as “good,” “fair,” and “poor.” Permanent impairments therefor are 37, 50, and 75 percent of the leg, respectively. Where, as here, preinjury arthritis, if left untreated, would have resulted in PPD of 50 percent, an injured worker with a TKR outcome of good or fair would get no PPD at all.

workers receiving lower benefits than the legislature mandated, and to many others having to litigate to secure benefits that should have been provided administratively. Moreover, because challenges will, of necessity, be fact specific, the likelihood is that increased litigation will become endemic. Fundamental objectives of the Act, declared in RCW 51.04.010 and RCW 51.12.010, to provide “sure and certain relief” to minimize injured workers’ suffering and economic loss, will be harmed, in many cases irreparably (because most Act beneficiaries are not represented by counsel).

For these reasons, this court should grant review.

## **2. Summary of argument on the merits**

At RCW 51.32.080, the Act mandates benefits for permanent partial disabilities. Subsection (5) of § 080 restricts the remedy, by directing that PPD be limited to as much of a permanent disability that was caused by the employment for which the claim was allowed:

(5) Should a worker receive an injury to a member or part of his or her body **already**, from whatever cause, **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.

As a matter of law, a history of previous symptoms, diagnosis, and

treatment, without more, does not establish neither disability nor permanence. In particular, a diagnosis of arthritis does not establish disability. At the time of injury, Tomlinson's arthritis was neither permanent nor disabling. 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 arthritis was changeable. Moreover, this court has also held that PPD is paid for loss of bodily function. There is no substantial evidence<sup>10</sup> that at the time of injury, Tomlinson's leg function was impaired. For the Court of Appeals to have concluded that at the time of injury his knee was "already... permanently partially disabling," as meant by RCW 51.32.080(5), misinterpreted the statute, resulting in his receiving a lower disability award than the legislature mandated, implicitly in RCW 51.12.010, and expressly at § 080(1)(a).

Moreover, RCW 51.32.080(5) plain language ("aggravation or increase") contemplates permanent partial impairment that *accumulates*. Tomlinson's permanent impairment did not accrete to impairment from arthritis; his permanent impairment resulted from TKR, alone.

Accordingly, the Department should have ordered a PPD for the full 75

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<sup>10</sup> Substantial evidence is evidence sufficient "to persuade a fair-minded, rational person of the truth of a declared premise." *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 330, 157 P.3d 859 (2007) (citation omitted).

percent permanent impairment of his leg.

There is a corollary to limiting an injured worker's PPD benefit to the disability his employment caused; the corollary is that an employer's responsibility for PPD should be limited to disability the employer's employment caused. But where an industrial injury aggravates a condition that at the time of injury was not permanently disabling, the employer is *wholly* responsible for resultant disability.

The Department and Board determine PPD as prescribed in the *Guides*, unless provided otherwise by law. The Department has rejected *Guides* impairment criteria before – but formally,<sup>11</sup> not ad hoc as in this case. Further, never, as far as Tomlinson knows, has an appellate court approved determining PPD contrary to the *Guides* where the *Guides* apply (*i.e.*, to PPD for extremities, in distinction to disabilities governed by the category system in WAC 296-20-200 through 296-20-690).

For these reasons, the Court of Appeals decision should be reversed.

**3. The Court of Appeals misinterpreted RCW 51.32.080(5) by concluding that the arthritis in Tomlinson's knee was "permanent partial disability"**

As cited above at p. 5, the Act is a self-contained plan of social

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<sup>11</sup> See WAC 296-20-19030, rejecting *Guides* provisions for PPD for certain pain.

insurance, governed by the statutes therein. The Act is remedial law, meant to minimize work-related suffering and economic loss. An important aspect of this remedial purpose is that reasonable doubt about benefits provisions must be resolved in injured workers' favor. *See Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d at 811 (“...where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker...”).

PPD mandated by RCW 51.32.080 is among the most important of Act remedies. Subsection (5) restricts PPD. Restrictions in remedial statutes should be confined to their plain terms:

This court has previously recognized that exemptions from remedial legislation...are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.

*Cerrillo v. Esparza*, 158 Wn.2d 194, 202, 142 P.3d 155 (2006) (citations and internal punctuation omitted). Tomlinson's arthritis was not plainly and unmistakably permanent partial disability. To the contrary, it was plainly neither permanent nor disabling under workers' compensation law.

The Act does not define “permanent partial disability,”<sup>12</sup> or

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<sup>12</sup> *See Harry v. Buse*, 134 Wn. App. 739, 745 n.22, 132 P.3d 1122 (2006) (“‘Partially disabled’ is not defined in ch. 51.08 RCW.”). The Act purports to define “permanent partial disability” at RCW 51.08.150, but the definition is circular, so useless here.

“permanent,” or “disability,” so the term or terms have their ordinary meanings. *McClarty v. Totem Electric*, 157 Wn.2d at 225. In multiple cases, our appellate courts have expressed that “permanent,” in regard to disability, means fixed and stable; not fluctuating; incapable of alteration; not changeable by medical intervention; immutable. Tomlinson’s arthritis was not “permanent.”

The Court of Appeals, addressing permanence in the context insurance coverage for bodily impairment, has said:

**[The term] “permanent’ is a term of common understanding; it is not ambiguous.**<sup>[13]</sup> 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 APPLEMAN & 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 (6<sup>th</sup> ed. 1990) (defining “permanent disability” as “one which will remain substantially the same during the remainder of worker’s compensation claimant’s life...”).

*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) (emphasis added, citations omitted).

*Summers* cited four precedents for the meaning of “permanent,”

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<sup>13</sup> “A statute is not ambiguous merely because different interpretations are conceivable.” *State v. Ose*, 156 Wn.2d 140, 124 P.3d 635 (2005) (citation omitted).

three of them workers' compensation decisions: *Hiatt v. Dep't of Labor & Indus.*, 48 Wn.2d 843, 297 P.2d 244 (1956), *Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 880 P.2d 539 (1975), and *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 *Hiatt*, the Supreme Court adopted this statement:

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.

48 Wn.2d 845-46 (citation and internal punctuation omitted, emphasis added).<sup>14</sup> A few sentences later the court endorsed this definition of "permanent," from *Webster's New International Dictionary* (2d ed. 1954):

Continuing or enduring in the same state, status, place, or the like, without fundamental or marked change; **not subject to fluctuation or alteration**; fixed or intended to be fixed; lasting; abiding; stable; not temporary or transient.

*Id.* (emphasis added). Finally, *Hiatt* concluded:

**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**

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<sup>14</sup> The fact that *Hiatt* involved permanent total disability is immaterial. See *id.*:

Permanent partial disability...contemplates a situation where the condition of the injured workman has reached a fixed state from which full recovery is not expected," citation omitted).

**physical condition arising from the injury is fixed, lasting, and stable. A person whose condition is remediable is not permanently disabled.**

*Id.* (emphasis added). Similarly, the court said, in *Williams*:

Permanent partial disability has been defined in case law as a partial incapacity to work as measured by loss of bodily function. ... [It] involve[s] 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**.

75 Wn. App. at 585 (citations omitted, emphasis added). In *Shea*, the court said:

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.

12 Wn. App. at 415 (emphasis added).

In, WAC 296-20-01002, the "Definitions" for the Department of Labor and Industries Medical Aid Rules, the Department formally enacted a similar rule:

**Permanent partial disability: Any anatomic abnormality or loss after maximum rehabilitation has been achieved, which is determined to be stable or nonprogressive at the time the evaluation is made. ...**

(Emphasis added.) Here, the doctors testified that before the industrial injury Tomlinson's arthritis was progressive.

When the meaning of statutory language is plain, the proper interpretation is that which gives effect to the plain language. *Burns v.*

*City of Seattle*, 161 Wn.2d 129, \_\_ P.3d \_\_ (2007). Here, *Summers*, *Hiatt*, *Williams*, *Shea*, and WAC 296-20-01002 establish that the arthritis Tomlinson had before his industrial injury was *not* permanent. The arthritis *was* changeable, alterable, and remediable. When it became disabling – because of the fall down PSFL’s stairs – it yielded to treatment. (That the cure turned out to be worse than the disease is immaterial.) When the Department determined PPD, he no longer had arthritis, and arthritis was no part of his impairment. In other words, the impairment PSFL had Drs. Chaplin and Smith testify *would* have been permanent, *if left untreated*, turned out to be *temporary*:

**The words “permanent” and “temporary” are antonyms of each other and readily occur to the ordinary mind as such. A disability that is transient or temporary cannot be a permanent one.**

*Summers*, 130 Wn. App. at 215 (emphasis added). *See also Hubbard v. Dep’t of Labor & Indus.*, 140 Wn.2d 35, 38 n.1, 992 P.2d 1002 (2000) (“The Industrial Insurance Act, Title 51 RCW, contemplates two separate and distinct disability classifications, temporary and permanent[.]”). Tomlinson’s arthritis was not *permanent* disability under RCW 51.32.080.

Tomlinson’s arthritis was not *disability*, either. In a long line of cases spanning more than half a century, this court has held that permanent partial disability is paid for loss of bodily function. *See*, most recently,

*Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 57 P.3d 611 (2002). At the Board, the rule is that “[t]he mere existence of pre-existing degenerative changes does not establish pre-existing disability.” *In re Mariah Smith*, No. 89 1277 (Bd. of Indus. Ins. Appeals, October 25, 1990). As the Board recently explained, in *In re Leonard Norgren*, No. 04 18211 (Bd. of Indus. Ins. Appeals, Jan. 12, 2006):

In an effort to enhance understanding of the term “disability,” the court in *Henson [v. Dep't of Labor & Indus.*, 15 Wn.2d 384 (1942)] related disability to its negative effect upon an individual's physical or mental functioning as well as his or her earning capacity. **Something more than existence of prior conditions requiring periodic medical attention was contemplated.** In the context of second injury fund relief,<sup>[15]</sup> a **“preexisting disability” is more than a mere preexisting medical condition and must, in some fashion, permanently impact on the worker's physical and/or mental functioning. ...**

(emphasis added.). In particular, a diagnosis of arthritis should not establish disability. See *In re Richard P. Murray*, No. 87 0440 (Bd. of Indus. Ins. Appeals, January 25, 1988) (“X-ray findings, while objective in that they can be seen, are not, solely by themselves, proof of a loss of physical function. Disability, not degenerative changes, is the issue here.); *In re Walter H. Johnston*, No. 974529 (Bd. of Indus. Ins. Appeals, March 2, 1999) (“Although degenerative changes were apparent on x-ray, without

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<sup>15</sup> Permanent disability “in the context of second injury fund relief” means the same thing as under § 080(5); both statutes operate only if, at the time of the industrial injury, the claimant already had a permanent disability. See RCW 51.16.120(1).

clinical findings they are not enough to support a disability award.”). *See also, In re William P. Nussbaum*, No. 90 3176 (Bd. of Indus. Ins. Appals, May 12, 1992):

There is no evidence that Mr. Nussbaum suffered any impairment, loss of function, or disability to his right leg as a result of pre-existing degenerative arthritic changes in that knee. It appears to us, based on this record, that the industrial injury of December 19, 1988 made active the latent condition of degenerative arthritis. Thus the resulting disability is attributable to the industrial injury. *Miller v. Dep't of Labor and Indus.*, 200 Wash. 674 (1939).

Here, there is no substantial evidence that the arthritis in Tomlinson's knee was disabling, or that he had disability of the knee.

**a. Because Tomlinson's arthritis was not permanent partial disability for the purpose of RCW 51.08.080(5), his industrial injury was not "aggravation or increase in such permanent partial disability"**

Tomlinson's industrial injury aggravated his arthritis.<sup>16</sup> In subsection (5), "aggravation or increase in such permanent partial disability" and "aggravation or increase of disability thereof" mean

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<sup>16</sup> Dr. Jiganti testified:

Q: What was your diagnosis in regard to Mr. Tomlinson on July 27, 1999?

A: That he had an arthritic aggravation of his left knee from his trauma of falling down the stairs.

Dr. Chaplin testified that "The diagnosis was again his status post total knee arthroplasty for aggravation of preexisting and ongoing degenerative condition, the aggravation being related to the injury of 07/21/99."

worsening of existing permanent partial disability: Because Tomlinson's arthritis was not permanent and disabling, subsection (5) does not apply:

The term "aggravate," in subsection (5), should not be confused with aggravation in the context of proximate cause in Act law. Among the longest-standing principles of workers' compensation law is that an employer takes the worker as he finds him, including infirmities, so where an industrial injury aggravates a preexisting condition that was *not* already permanently partially disabling, and the aggravation results in permanent disability, the employer is responsible for the *whole* disability:

This instruction [that "If an industrial injury lights up or makes active a latent or quiescent infirmity or weakened physical condition, then the resulting disability is to be attributed to the injury and not to the pre-existing physical condition"] was based upon our holding in *Miller v. Department of Labor & Indus.*, 200 Wash. 674, 94 P.2d 764 (1939), and the subsequent cases in which this court and the Court of Appeals have applied its doctrine. As explained there, the principle is that if the accident or injury complained of is the proximate cause<sup>17</sup> 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 or congenital weakness; the theory upon which that principle is founded is that the workman's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated.**

*Bennett v. Dep't of Labor & Indus.*, 95 Wn.2d 531, 532-33, 627 P.2d 104

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<sup>17</sup> The term "the" was inaccurate; industrial injury need be only *a* proximate cause, not *the* proximate cause. See WPI 155.06, "Proximate cause – allowed claim," and the "Comment" to the instruction.

(1981) (citations omitted.) *See also, Lytle v. Dep't of Labor & Indus.*, 66 Wn.2d 745, 746, 405 P.2d 251 (1965):

The facts relative to the employee's injury are not in dispute. He fell and suffered injuries to his back and left hip, resulting in the total-and permanent disability classification. **The medical evidence shows that the employee suffered from a preexisting disease, referred to as a condition of degenerative arthritis, which, prior to his injury of November 15, 1960, was latent, or quiescent, and not disabling. This arthritic condition was "lighted up," or aggravated, by the injury and the employee's permanent disability was due to the combined effects of both.**

(Emphasis added.)<sup>18</sup> This rule applies no matter how little an industrial injury contributes final disability:

The conclusion we draw is that the industrial injury was the proverbial "straw that broke the camel's back." It was the causative event that began the symptomatic progression of the low back arthritis, as well as the acceleration of the underlying condition revealed by the serial MRIs. In short, the industrial injury was the proximate cause of the disability that originated when the previously asymptomatic and nondisabling low back arthritic condition became active and symptomatic. *Miller v. Department of Labor & Indus.*, 200 Wash. 674 (1939).

*In re Suzanne E. Dyer*, No. 03 15747 [etc.] (Bd. of Indus. Ins. Appeals, March 1, 2005) (emphasis added). *See also, In re James I. McIntosh*, No. 89 2352 (Bd. of Indus. Ins. Appeals, Jan.30, 1991):

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<sup>18</sup> *See also City of Bremerton v. Shreeve*, 55 Wn. App. 334, 341, 777 P.2d 568 (1989) ("the worker is to be taken as he is, and a preexisting condition should not be considered a 'cause' of injury, but merely a condition upon which the 'proximate cause' operated" (citations omitted)). Appellate courts said the same thing in *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d at 471; *Champion Int'l, Inc. v. Dep't of Labor & Indus.*, 50 Wn. App. 91, 93-94, 746 P.2d 1244 (1987); *Wendi v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 682-83, 571 P.2d 229 (1977); and *Shea v. Dep't of Labor & Indus.*, 12 Wn. App. at 414.

...While the physical effect of this impairment may have been minor, its legal effect on the outcome of Mr. McIntosh's claim is significant. The impairment admitted to have been caused by the industrial injury is truly analogous to the "straw that broke the camel's back". While Mr. McIntosh may have been a marginal member of the workforce, he was employed for several years prior to the industrial injury [but because of the small additional effect of the industrial injury became unemployable]. ...

Finally, *see In re Lawrence Musick*, No. 48 173 (Bd. of Indus. Ins. Appeals, March 20, 1978):

What was the proximate cause of such total disability status? We believe it must be held to be the residual effects of the 1975 injury herein. Mild though such residuals were, in terms of hard physical findings, they were in our view the "straw that broke the camel's back" in light of the total record. **Claimant's severe, but intermittent, back problems prior to this injury were changed into continuous and more limiting and painful problems by said injury**; and the claimant – in Dr. Staker's words – has "run out of gas," as the result of this worsening effect. This, to us, appears to be the real import of this evidence: Claimant had always been well motivated to return to work in spite of his intermittent problems, but the further impact of this last injury "did him in," so far as continued working ability was concerned.

(Emphasis added.)

Courts must take care to keep proximate cause law clearly in mind when determining whether RCW 51.32.080(5) should apply:

**Cases of this kind are to be distinguished from those where the worker is already *permanently partially disabled***, within the meaning of the workers' compensation act, in which circumstances RCW 51.32.080(3) [now subpart (5)] applies. That section requires segregation of the preexisting disability and limits the award to the disability resulting from the later injury.

*Miller v. Dep't of Labor & Indus.*, 200 Wash. at 683 (emphasis added).

Tomlinson's arthritis was a condition on which his industrial injury operated to cause PPD. The arthritis was not permanent. Accordingly, the arthritis was not, itself, a "preexisting permanent disability" under subsection (5).

PSFL has never denied responsibility for the TKR.<sup>19</sup> Intrinsic to responsibility for the *surgery* is responsibility for the *outcome*. Not *part* of the outcome; *all* of it.

**F. Conclusion**

The *Tomlinson* decision shows serious questions of substantial public importance, reaching the fundamental nature of the Act, which this court should review. He asks the court to grant his petition for review.

DATED this 15 day of October 2007.

Respectfully submitted,

RUMBAUGH RIDEOUT BARNETT & ADKINS

  
\_\_\_\_\_  
Terry J. Barnett, WSB 8080, Attorneys for  
James Tomlinson

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<sup>19</sup> At the summary judgment hearing in superior court, PSFL said:

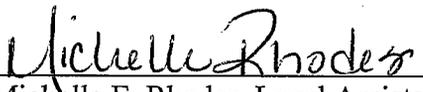
...[T]hat arthritic condition contributed to the need for the [total knee] replacements. Our injury played a role on top of that That's why we're responsible for the claim ....

**CERTIFICATE OF SERVICE**

Under penalty of perjury under the laws of the State of Washington,  
I certify that today I mailed this pleading as follows:

Jerald P. Keene, attorney at Law  
Lincoln Center Tower  
10260 SW Greenburg Rd. Suite 1250  
Portland, OR 97222-5522

DATED this 16 day of October 2007.

  
Michelle E. Rhodes, Legal Assistant

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COURT OF APPEALS  
DIVISION II  
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11 of 22 DOCUMENTS

**James Tomlinson, Appellant, v. Puget Sound Freight Lines, Inc., et al. Respondents.**

**No. 35219-2-II**

**COURT OF APPEALS OF WASHINGTON, DIVISION TWO**

*2007 Wash. App. LEXIS 2657*

**September 18, 2007, Filed**

**COUNSEL:** [\*1] For Appellants: Terry James Barnett, Attorney at Law, Tacoma, WA.

For Respondent: Jerald P. Keene, Attorney at Law, Portland, OR; Michael H. Weier, of Reinisch Weier & Mackenzie PC, Seattle, WA.

**JUDGES:** Armstrong, J. We concur: Van Deren, A.C.J., Penoyar, J.

**OPINION BY: ARMSTRONG**

**OPINION**

¶1 Armstrong, J. -- James Tomlinson fell down a flight of stairs and injured his arthritic left knee while working for Puget Sound Freight Lines, Inc. (PSFL) After total knee replacement surgery, he filed a claim for permanent partial disability compensation under the Industrial Insurance Act. <sup>1</sup> Three orthopedic surgeons opined that Tomlinson's left knee merited a 75 percent permanent partial disability award. The doctors also agreed that degenerative arthritis in Tomlinson's knee caused a preexisting 50 percent permanent partial disability. Accordingly, the Department of Labor & Industries (Department) awarded Tomlinson a permanent partial disability payment of 75 percent of the amputation value of his left leg above the knee, less the preexisting 50 percent attributable to his arthritis, following *RCW 51.32.080(5)*. The Board of Industrial Insurance Appeals (Board) affirmed, and the Pierce County Superior Court granted summary judgment for [\*2] (PSFL), affirming the Department's decision allowing the 50 percent credit. On appeal, Tomlinson advances several reasons why the Department erred in finding that he had a 50 percent permanent partial disability in his knee before the

industrial accident. Finding no error, we affirm.

1 Title 51 RCW.

**FACTS**

¶2 James Tomlinson sustained an industrial injury when he fell down a flight of stairs while working as a dispatcher for PSFL. The injury caused trauma to his left knee and eventually necessitated total knee replacement surgery.

¶3 After the initial knee replacement surgery failed, Tomlinson underwent a second total knee replacement operation. Dr. John Jiganti evaluated Tomlinson after his second total knee replacement surgery and determined that he should have a permanent partial disability rating examination. Doctors Jiganti, David Chaplin, and James B. Smith agreed that Tomlinson's poor surgical result following the second total knee replacement merited a permanent partial disability award of 75 percent of the value of the left leg above the knee joint with short thigh stump. The doctors agreed that the poor surgical result accounted for 100 percent of the [\*3] permanent partial disability.

¶4 Tomlinson had first developed knee problems while in the Air Force in the 1960s. He received some medical treatment for his left knee in the 1990s as well as some disability compensation from the Veterans Administration. Medical records and x-rays from the 1990s showed that at the time of the industrial injury, Tomlinson suffered from degenerative arthritis in both of his knees. Dr. Chaplin and Dr. Smith determined--and Dr. Jiganti agreed--that Tomlinson's degenerative arthritis caused a 50 percent impairment in his left knee.

¶5 The Department accepted the 75 percent disability rating, but it offset Tomlinson's disability award by the 50 percent preexisting impairment that the arthritis in his left knee caused. An industrial appeals judge (IAJ) affirmed the Department's order and the Board denied Tomlinson's petition for review and adopted the IAJ's proposed decision and order. Tomlinson appealed the Board's order to the Pierce County Superior Court.

¶6 At the superior court, Tomlinson moved for summary judgment, arguing that the Department incorrectly calculated his disability award because at the time the Department determined the extent of his permanent partial [\*4] disability, his arthritic knee had been removed and replaced with a prosthetic knee. The trial court rejected Tomlinson's legal theory and denied his summary judgment motion. Counsel for Tomlinson and PSFL then agreed that the motion was dispositive and that the case need not proceed to trial. Tomlinson appeals the trial court's denial of his summary judgment motion.

¶7 *RCW 51.32.080(5)* directs the Department to take into account any preexisting permanent partial disability to the same body part injured in an industrial accident when the Department awards permanent partial disability compensation. Here, three expert witnesses testified that the Tomlinson's preexisting degenerative arthritis caused a 50 percent impairment. The question is whether the Department, the Board, and the trial court erred in applying *RCW 51.32.080(5)* to offset Tomlinson's permanent partial disability award by the percentage of disability attributable to his degenerative arthritis--a question of law.

## ANALYSIS

### I. Standard of Review

¶8 We review questions of statutory interpretation *de novo*. *Jenkins v. Dep't of Soc. & Health Servs.*, 160 *Wn.2d* 287, 296, 157 *P.3d* 388 (2007).

¶9 We construe the Industrial Insurance [\*5] Act liberally to reduce to a minimum the suffering and economic loss arising from injuries or death in the course of employment. *RCW 51.12.010*. Accordingly, where reasonable minds can differ over the meaning of the act's provisions, we resolve all doubts in the injured worker's favor. *Cockle v. Dep't of Labor & Indus.*, 142 *Wn.2d* 801, 811, 16 *P.3d* 583 (2001) (quoting *Dennis v. Dep't of*

*Labor & Indus.*, 109 *Wn.2d* 467, 470, 745 *P.2d* 1295 (1987)).

### II. Interpretation Of Permanent Partial Disability Under *RCW 51.32.080(5)*

¶10 Our objective in interpreting a statute is to ascertain and carry out the legislature's intent and purpose in creating the statute. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 *Wn.2d* 224, 239, 59 *P.3d* 655 (2002) (citing *State v. Sullivan*, 143 *Wn.2d* 162, 174-75, 19 *P.3d* 1012 (2001)). To determine legislative intent, we first look to the statute's language. *Tenino Aerie*, 148 *Wn.2d* at 239. If the language is unambiguous, we look no further. *Am. Disc. Corp. v. Shepherd*, 160 *Wn.2d* 93, 98, 156 *P.3d* 858 (2007) (citing *Wash. State Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 *Wn.2d* 894, 904, 949 *P.2d* 1291 (1997)); see [\*6] also *Cerrillo v. Esparza*, 158 *Wn.2d* 194, 202, 142 *P.3d* 155 (2006) (courts confine restrictions on statutory remedies to their plain terms) (quoting *Drinkwitz v. Alliant Techsystems, Inc.*, 140 *Wn.2d* 291, 301, 996 *P.2d* 582 (2000)).

¶11 *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, 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.

¶12 Tomlinson argues that the degenerative arthritis in his knee did not render his leg "already ... permanently partially disabled" under *RCW 51.32.080(5)*. Reply Br. of Appellant at 18. He offers four reasons why the Department erred in finding otherwise: (1) the evidence was insufficient to prove that he was disabled before the work injury; (2) no physician rated his knee with a permanent disability before his workplace [\*7] injury; (3) his arthritic condition was progressive and, therefore,

not fixed and stable as the concept of *permanent* requires; and (4) the first knee surgery removed all the arthritis and, thus, he had no disabling arthritis at the time the Department accepted his 75 percent disability.

### 1. Partial Disability

¶13 Tomlinson maintains that his knee symptoms before the work injury and the fact that doctors told him he would eventually need a knee replacement do not establish a preexisting partial disability. We disagree.

¶14 Under Washington's Industrial Insurance Act, a partial disability is a partial incapacity to work based on objective physical or clinical findings establishing a loss of function. *Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 586, 880 P.2d 539 (1994) (citing *Dowell v. Dep't of Labor & Indus.*, 51 Wn.2d 428, 433, 319 P.2d 843 (1957)); see also *Henson v. Dep't of Labor & Indus.*, 15 Wn.2d 384, 391, 130 P.2d 885 (1942) ("disability" means the impairment of the workman's mental or physical efficiency).

¶15 Dr. Jiganti, the orthopedic surgeon who treated Tomlinson after his injury, testified that because of the advanced arthritis, Tomlinson likely suffered pain when using the knee [\*8] immediately before the injury. Dr. Jiganti also said that one side effect of pain could be limited use of the affected body part.

¶16 Dr. Chaplin, an orthopedic surgeon who evaluated Tomlinson several years after the industrial injury, testified that Tomlinson had arthritis in his knee before his fall. Dr. Chaplin also testified that Tomlinson's medical records showed that Tomlinson had painful joints in both knees for the last 10 to 15 years, that doctors drained his left knee in 1974, and that both knees would occasionally lock and interfere with his mobility. He testified that most of the cartilage in Tomlinson's knee had deteriorated, leading to bone-on-bone contact, and that bone-on-bone contact implies stiffness, pain with weight-bearing, and pain with motion. According to Dr. Chaplin, the American Medical Association guides provide that Tomlinson's lack of cartilage in his knee joint (bone-to-bone contact) constituted a 50 percent impairment.

¶17 Dr. Smith, an orthopedic surgeon who also evaluated Tomlinson some time after the industrial injury, testified that Tomlinson had advanced arthritis in his knee, which more likely than not caused pain and

functional impairment before the work [\*9] injury. Dr. Smith agreed that Tomlinson's condition before the industrial injury resulted in a 50 percent lower extremity impairment.

¶18 The orthopedic surgeons' testimony sufficiently establishes Tomlinson's partial loss of function in his left knee and supports the IAJ's finding that Tomlinson had symptomatic, advanced degenerative arthritis in his left knee at the time of the industrial injury. See *Williams*, 75 Wn. App. at 586.

¶19 In addition, the IAJ found that Tomlinson's degenerative arthritis was disabling before the work injury. Tomlinson has not challenged this finding and when he stipulated that the trial court's summary judgment ruling left no issues to be tried, he waived any challenge to the IAJ's findings.

¶20 This case is analogous to *Beyer v. Department of Labor & Industries*, 17 Wn.2d 29, 32, 134 P.2d 948 (1943), where our Supreme Court held that, in applying an earlier but similar version of *RCW 51.32.080(5)*,<sup>2</sup> the Department correctly reduced the amount of the claimant's ultimate partial disability compensation by the amount attributable to a preexisting injury. The plaintiff in *Beyer* suffered an injury at work that rendered him blind in one eye but did not file a claim to receive compensation [\*10] for that injury. *Beyer*, 17 Wn.2d at 29-30. Several years later, the plaintiff reinjured the same eye at work, necessitating removal of his eye. *Beyer*, 17 Wn.2d at 30. The plaintiff filed a claim under the "workmen's compensation act" seeking compensation for the loss of his eye. See *Beyer*, 17 Wn.2d at 30.

2 The statute involved in *Beyer*, which is nearly identical to the current *RCW 51.32.080(5)*, stated:

"Should a workman receive an injury to a member or part of his body already from whatever cause 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 workman, his compensation for such permanent 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."

*Beyer*, 17 Wn.2d at 31 (quoting Laws of 1927, ch. 310, at 844).

¶21 The relevant workmen's compensation statute then compensated an injured worker \$1,440 for the loss of one eye by enucleation and \$1,080 for the loss of sight of one eye. *Beyer*, 17 Wn.2d at 30. The supervisor of [\*11] industrial insurance held that since the plaintiff was blind in the eye he lost, he should receive the difference between the compensation provided for the loss of one eye by enucleation and the amount awarded for loss of sight of one eye. *Beyer*, 17 Wn.2d at 30. On appeal, the trial court reversed, ruling that the plaintiff should receive the full award for losing his eye. *Beyer*, 17 Wn.2d at 30.

¶22 Our Supreme Court then held that *RCW 51.32.080(5)* applied because the plaintiff's original injury rendered him permanently partially disabled but did not result in permanent total disability. *Beyer*, 17 Wn.2d at 31. The court concluded that the plaintiff's original injury rendered him permanently partially disabled even though he had not filed a compensation claim for the first injury. See *Beyer*, 17 Wn.2d at 30-31. The court held that the Department properly deducted the amount of compensation the worker was entitled to for the first disability from the final disability payment. *Beyer*, 17 Wn.2d at 32.

¶23 Similarly, in the present case, the Department correctly applied and interpreted *RCW 51.32.080(5)*, which directed the Department to consider Tomlinson's preexisting permanent arthritic condition [\*12] in fixing Tomlinson's ultimate disability compensation.

¶24 Tomlinson distinguishes *Beyer* on the grounds that the parties in that case agreed that the plaintiff's loss of sight constituted a permanent disability. He claims that his degenerative arthritis was not permanent and that, therefore, the Department erred in applying *RCW 51.32.080(5)*.

## 2. Permanence

¶25 Tomlinson argues his previous arthritic condition was not permanent. First, he maintains that no physician rated him for a permanent partial disability before the work injury. To the extent this is a challenge to

the sufficiency of the evidence, Tomlinson waived the argument by stipulating that no issues remained for trial after the summary judgment ruling. And Tomlinson cites no authority for the proposition that the Department cannot legally find a preexisting disability absent a contemporary medical rating, which is typically obtained only for work injuries. The language of the statute covering preexisting permanent disabilities "from whatever cause" suggests that the legislature intended *RCW 51.32.080(5)* to apply to all previous disabilities, not just those caused by work injuries.

¶26 Tomlinson also argues that his degenerative arthritis [\*13] was not permanent because it was progressive, not fixed and stable. Alternatively, he argues that a disability is not permanent if it is amenable to treatment. Tomlinson maintains that doctors "treated" his degenerative arthritis through a total knee replacement, where they removed his knee and the arthritis. Reply Br. of Appellant at 17.

¶27 The legislature did not define "permanently" or "permanent" in the Industrial Insurance Act.<sup>3</sup> Where a statute fails to define a particular term, we give the term its plain and ordinary meaning, keeping in mind the statute's context as a whole. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 225, 137 P.3d 844 (2006) (citing *One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 148 Wn.2d 319, 330, 61 P.3d 1094 (2002)). And while we may resort to a dictionary for a statutory term's meaning, see *McClarty*, 157 Wn.2d at 225 (citing *Schrom v. Bd. of Volunteer Fire Fighters*, 153 Wn.2d 19, 28, 100 P.3d 814 (2004)), we avoid strict, literal interpretations that result in absurd or strained consequences that the legislature most likely did not intend. *Tenino Aerie*, 148 Wn.2d at 239 (citing *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992)).

3 The act does define a "permanent partial disability" in general, [\*14] see *RCW 51.08.150* (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"), but this definition is not helpful to the issue here.

¶28 Tomlinson argues that his former degenerative arthritic condition does not fit the dictionary definition of "permanent" as "continuing or enduring (as in the same

state, status, place) without fundamental or marked change : not subject to fluctuation or alteration : fixed or intended to be fixed." Webster's Third New International Dictionary 1683 (2002). He reasons further that because his arthritis was progressive, it was not fixed or stable and thus does not fall within our definition of "permanent" in *Summers v. Great Southern Life Insurance Co.*, 130 Wn. App. 209, 216, 122 P.3d 195 (2005) (defining "permanent" as "'a state of indefinite continuance, ... something incapable of alteration, fixed, or immutable'" (alteration in original) (quoting 1C John Alan Appleman & Jean Appleman, Insurance Law And Practice § 641, at 206 (1981))), review denied, 157 Wn.2d 1025 (2006); see also *Hiatt v. Dep't of Labor & Indus.*, 48 Wn.2d 843, 845-46, 297 P.2d 244 (1956) [\*15] (a person whose condition is remediable is not permanently disabled, and a disability should not be declared permanent unless it appears that the affliction will not yield to treatment); *Shea v. Dep't of Labor & Indus.*, 12 Wn. App. 410, 415, 529 P.2d 1131 (1974) (a disabling condition is permanent when "no longer remedial and its character has expectedly an unchangeable existence"), review denied, 85 Wn.2d 1009 (1975).<sup>4</sup>

4 Tomlinson also claims that under the Department's regulations, a permanent partial disability is a disabling condition that is "determined to be stable or nonprogressive" and that since his arthritis was progressive, it was not a permanent partial disability. Br. of Appellant at 23. Tomlinson cites *WAC 296-20-01002* for this proposition, but in 2002 that definition was moved to a new section, *WAC 296-20-19000*, which deals with "permanent partial disability award[s]." (Emphasis added.) Moreover, "permanent partial disability" in *RCW 51.32.080(5)* includes pre-existing conditions not submitted for an award and defines the disability in the context of when a worker's condition has reached maximum medical improvement. Finally, neither party has briefed whether *WAC 296-20-19000* [\*16] applies to Tomlinson's preexisting condition. Because of these distinctions and the lack of briefing, we decline to consider whether the WAC applies here.

¶29 Doctors Jiganti, Chaplin, and Smith agreed that Tomlinson suffered from severe degenerative arthritis. Tomlinson is correct that a degenerative condition, by definition,<sup>5</sup> is not fixed and stable. But the strict, literal

interpretation of the term "permanent" that Tomlinson advances produces a strained result that the legislature most likely did not intend with *RCW 51.32.080(5)*. See *Tenino Aerie*, 148 Wn.2d at 239. We conclude that the statutory meaning of "permanent" for purposes of *RCW 51.32.080(5)* focuses on whether the condition is curable; the legislature did not intend to exclude incurable preexisting disabilities that continue to worsen. Dr. Smith testified that cartilage is unable to repair itself, and other medical experts testified that advanced erosion of cartilage in the knee implies stiffness, pain with weight bearing, and pain with motion. This testimony established that Tomlinson's degenerative arthritis was permanent as that term is used in *RCW 51.32.080(5)*.

5 "Degenerate" means "to descend to a markedly worse condition [\*17] in kind or degree." Webster's Third New International Dictionary at 593 (2002).

¶30 Still, Tomlinson contends that although his arthritis would have been permanent if left untreated, his arthritis was merely temporary because it was "treatable" by removal through a total knee replacement. Reply Br. of Appellant at 17.

¶31 But *RCW 51.32.080(5)* refers to permanent partial disability existing at the time of the work injury, not at the time the final disability is rated. And Tomlinson had degenerative arthritis when he fell at work. Moreover, the statute applies to work injuries that result "in the amputation thereof," referring to the partially disabled body part. Thus, a worker with a disabling bone, muscle, or nerve condition of the work-injured limb that is amputated because of the work injury comes within the statutory credit scheme. Yet in such cases, the amputation would remove the existing bone, muscle, or nerve condition and, according to Tomlinson's argument, would cure the condition. We disagree with this strained statutory interpretation, which we can avoid by applying the statute's clear words: the credit applies to disabilities the worker has at the time of the work injury, not after [\*18] treatment for the injury. Accordingly, Tomlinson's surgical amputation of his knee did not cure his preexisting arthritis that rendered him 50 percent disabled at the time of the injury. The Department correctly applied *RCW 51.32.080(5)* in calculating Tomlinson's permanent partial disability award.

¶32 Tomlinson requests reasonable attorney fees pursuant to *RCW 51.52.130*. Because we affirm the

decision and order of the Board, this request is denied.

Van Deren, A.C.J., and Penoyar, J., concur.

¶33 Affirmed.