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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**Department of Labor and Industries,**

**Petitioner,**

**v.**

**Puget Sound Energy, Inc.,**

**Respondent.**

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**ANSWER TO PETITION FOR REVIEW**

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**ORIGINAL**

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## I. COURT OF APPEALS DECISION

The Petitioner, Department of Labor and Industries ("Department"), has asked this Court to grant discretionary review of the decision of Division I of the Court of Appeals in *Puget Sound Energy, Inc. v. Lee*, 149 Wn. App 866, 205 P.3d 979 (2009).

## II. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals correctly reverse the trial court's ruling striking Puget Sound Energy's ("PSE") demand for jury and correctly remand the case to the superior court for a jury trial? In short, was the Court of Appeals correct in concluding that PSE had presented substantial evidence that Robert Lee ("Lee") had a previous bodily disability from which a jury could find that PSE was entitled to second injury relief under RCW 51.16.120.

## III. STATEMENT OF THE CASE

### A. Procedural Background to PSE's Appeal to the Court of Appeals.

This case arose from an appeal to superior court pursuant to RCW 51.52.115 by PSE, a self-insured employer under Title 51 RCW, from the final Decision and Order of the Board of Industrial Appeals (the "Board") issued September 18, 2006. The Board denied PSE's request for second injury fund relief under RCW 51.16.120.

Pending trial, Lee filed a motion for partial summary judgment seeking a ruling establishing his right to a permanent total disability pension under the Industrial Insurance Act. PSE did not oppose the motion but preserved its right to seek second injury relief before a jury.

After the superior court deadline for dispositive motions had passed, the Department filed a motion to strike the jury. Two days before the trial date, the superior court granted the Department's motion. PSE sought reconsideration of that ruling, which was denied. PSE then filed a motion for discretionary review of the superior court's ruling with the Court of Appeals. That motion was denied by a court commissioner with the direction that the matter be allowed to proceed to trial.

A bench trial was held resulting in a decision to affirm the Board's Decision and Order denying second injury relief to PSE. In affirming the Board's decision, the superior court concluded as a matter of law that Lee did not suffer from a "previous disability" under RCW 51.16.120. The superior court concluded there was no evidence that Lee was symptomatic when he commenced employment with PSE, or that he had requested or received any accommodation to perform his duties while a PSE employee. In addition, the superior court found that Lee had no impairment that had hindered his ability to obtain or maintain employment prior to his 1992 injury.

PSE appealed the superior court's judgment and order to the Court of Appeals. The Court of Appeals held that the trial court erred in striking PSE's jury demand because PSE presented substantial evidence showing that Lee had a previous disability and directed the case be remanded to permit a jury trial under RCW 51.52.115 on PSE's eligibility for second injury fund relief. *Puget Sound Energy, Inc.*, 149 Wn. App. at 891

**B. The Court of Appeals Correctly Recognized the Legal Criteria for Entitlement to Second Injury Fund Relief.**

In rendering its decision, the Court of Appeals correctly recited that in order for an employer to be eligible for second injury fund relief, the worker must (1) have a previous bodily disability from any previous injury or disease, whether known or unknown to the employer; (2) suffer a further disability from injury or occupational disease in employment, and (3) become totally and permanently disabled from the combined effects of the previous bodily disability and the later industrial injury or occupational disease. *Puget Sound Energy, Inc.*, 149 Wn. App. at 879-880. *See also Seattle Sch. Dist. No. 1 v. Dep't of Labor & Indus.*, 57 Wn. App. 87, 93 (1990), *aff, in part, and rev, in part*, 116 Wn.2d 352 (1991). An employer is not entitled to second injury relief where a worker's permanent total disability is solely the result of the later-occurring industrial injury/occupational disease.

**C. The Court of Appeals Correctly Analyzed Evidence of the Impact of Lee's Admitted History of Debilitating Injuries Occurring Prior to His PSE Employment Holding that Questions of Fact Existed to Be Presented to a Jury.**

Prior to his employment with PSE, Lee had spent twenty-two years as a lineman, working for numerous employers in many western states. During that career, he suffered three debilitating injuries affecting his back and neck. The occurrence of those injuries is not in dispute. Whether those injuries caused previous bodily disability is disputed and present question of facts for a jury as the trier of fact to properly decide.

In support of its decision to remand for jury trial, the Court of Appeals carefully examined the evidence in the Certified Appeal Board Record ("CABR"), drawing attention to Lee's sworn testimony describing the three serious injuries to Lee prior to his PSE employment: (1) an injury in 1979 to his neck and arms while working for International Line Builders in Oregon, (2) an injury in 1981 to his low back causing a traumatic spondylolysis while working for West Coast Electric, and (3) a non-industrial injury in 1987 causing searing pain to both his neck and back. *Puget Sound Energy, Inc.*, 149 Wn. App. at 871-873.

The Court further analyzed the testimony of the three medical doctors whose testimony was preserved in the CABR. The Court correctly noted that such testimony gave rise to questions of fact surrounding

whether Lee developed any bodily disability that would have preexisted his PSE employment and, if so, whether such previous bodily disability could be viewed by a trier of fact as a proximate cause of Lee's ultimate permanent total disability. *Id.* at 873-875, 891.

#### IV. ARGUMENT

Whether the criteria for second injury relief are satisfied inherently raises questions of fact. PSE properly demanded a jury to be the trier of fact. The Court of Appeals' reversal of the superior court's ruling striking the jury was unqualifiedly correct.

The Rules of Appellate Procedure state that a petition for review will be accepted by the court "only: (1) [i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) [i]f the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) [i]f a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) [i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

**A. There Is No Conflict Between the Decision of the Court of Appeals and Any Decision of this Court or the Court of Appeals.**

The Department's petition asserts that the Court of Appeals decision conflicts with decisions of the Supreme Court and the Court of

Appeals. To the contrary, none of the cases cited in the Department's petition are on point with the Court of Appeals' decision in this case.

The primary case on which the Department relies, *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 206 P.3d 657 (2009), dealt with the application of RCW 51.32.080(5) relating to the reduction of an award for permanent partial disability ("PPD") where there was substantial evidence of a preexisting permanent impairment to the same area of the body which was later injured. In affirming the Department's reduction of benefits, this Court commented that such a reduction is appropriate where the worker's preexisting condition permanently impacts the worker's physical or mental functioning, adding in dicta that recognition of preexisting PPD is not appropriate when a condition causes only intermittent impairment of function. *Tomlinson*, 116 Wn.2d at 118.

Contrary to the thrust of the Department's argument in its petition, substantial evidence exists in the testimony contained in the CABR that Lee's previous disability attributable to his three prior traumatic injuries did adversely impact Lee's physical functioning and was not of an intermittent nature.

Lee testified that the effects of his prior injuries persisted through the years, causing great interference in the performance of job duties with various employers. As a result, he was led to seek lighter jobs in his field

as a crew chief or nonworking foreman. In the case of his 1981 traumatic spondylolysis injury, he was hospitalized several weeks and was temporarily totally disabled for several months before being able to find work as a "non-working" foreman in Alaska. CABR Lee (37, 65-66).

Lee freely admitted he worked through his pain his entire career, and that following his neck and right shoulder injury in Oregon in 1979, he often had to let his union brothers cover for him. CABR Lee (29, 34-35).

Both before and after his 1981 low back traumatic spondylolysis injury, Lee admitted to a continuous need for prescription medications to get through the work day, commonly using such medications because of pain and spasm prior to the PSE injury. He acknowledged he had physical restrictions because of injuries which had occurred before his PSE employment. CABR Lee (36, 61, 68).

Lee acknowledged he had repeatedly denied the facts surrounding the history of his prior injuries to physicians treating and examining him. Further, he admitted that he had substantial physical limitations because of the permanent effects of his earlier injuries preceding the 1992 PSE injury. Those restrictions forced him to frequently seek professional care to enable him to continue working. CABR Lee (69, 75, 76, 81, 82, 89).

Lee was not precluded from all employment as a result of his prior injuries. However, PSE's entitlement to second injury relief is predicated on the proposition that a worker is able to work until the combined effects of permanent impairment from a "second" injury precludes further employment.

PSE submits that because the record of Lee's testimony strongly supports his admissions of the continual physical impairment and restrictions he experienced through the years, PSE should be entitled to argue that such limitations, fully substantiated by objective medical findings, had caused permanent impairment affecting his ability to function physically prior to his PSE employment.

The analysis by the Court of Appeals recognized that the evidence raised clear questions of fact and is not in conflict with this Court's holding or dicta in *Tomlinson*. To the contrary, the Court of Appeals' recognition of the strong public policy encouraging employers to hire previously disabled workers does not conflict with any policy or legal considerations presented in *Tomlinson*.

In *Tomlinson*, this Court discussed the nature of prior physical complaints of impairment that either would or would not provide a basis for reducing a permanent partial disability award from a later-occurring injury.

This Court in *Tomlinson* considered the nature of previous impairments before permitting the reduction of a PPD award granted to a worker under RCW 51.32.080(5) and discussed how the terms of the statute should be applied to an injured worker with a previous permanent impairment to an area of the body which is further injured in a later-occurring injury. *Tomlinson* is not at all in conflict with this Court's opinion in *Lee*.

The Department asserts that two other cases are in conflict with the Court of Appeals' decision in *Lee*. PSE submits these cases, *Bennett v. Dep't of Labor & Indus.*, 95 Wn.2d 531, 627 P.2d 184 (1981) and *Rothschild Int'l v. Dep't of Labor & Indus.*, 3 Wn. App. 967, 478 P.2d 759 (1970), simply do not present any conflict with the Court of Appeals' decision in this case.

*Bennett* concerned the propriety of a jury verdict setting the amount of PPD for a worker who was not permanently totally disabled. There, unlike this case with testimony from Dr. Gritzka, who offered specific PPD ratings of Lee's previous bodily disability, there was no medical evidence that the injured worker had a previous disability. The jury verdict was affirmed when the Court found the evidence in that case satisfied the criteria of "lighting up" of a latent quiescent preexisting condition. The precedent for doing so was examined in *Miller v. Dep't of*

*Labor & Indus.*, 200 Wash. 674, 94 P.2d 764 (1939). That case affirmed that the resulting disability from an industrial injury which lighted up or made active a latent or quiescent infirmity or weakened physical condition was to be attributed to the industrial injury and not the preexisting condition. Unlike the evidence in *Bennett*, Dr. Gritzka's testimony clearly documented that Lee's prior disability was not a mere latent quiescent infirmity. Such evidence is clearly distinguishable from the issue and evidence addressed in *Bennett*.

*Rothschild* was decided on the issue of proximate cause. That is, the evidence supported that the industrial injury in that case was the sole and exclusive cause of the worker's permanent total disability. PSE agrees that second injury relief is not appropriate unless the evidence shows such disability is due to the combined effects of impairment from the industrial injury superimposed upon previous bodily disability. In *Rothschild*, the evidence showed there was a mere "latent threat" that the worker could develop a problem. There was no clearly documented and medically rated preexisting disability. In *Rothschild*, the industrial injury "triggered" a new condition which contributed to the ultimate disability causing the worker to become permanently totally disabled—solely as the result of the industrial injury which occurred while working for Rothschild. The

evidence analyzed by the Court of Appeals in *Lee* supports far more than the possibility of a latent threat.

In short, *Tomlinson*, *Bennett* and *Rothschild* fail to support the Department's argument that a conflict in case holdings exists.

**B. The Fundamental Question in PSE's Challenge Is to the Correctness of the 2-1 Decision of the Board.**

This case centers on the correctness of the Board's decision. The Board's majority, over the dissent of late member Calhoun Dickinson, held that PSE had not provided sufficient evidence to establish that Lee had a substantial preexisting "disability," a prerequisite for second injury relief. The Court of Appeals held that PSE had presented evidence which, if accepted by a trier of fact, would support that Lee did have a previous bodily disability, along with other evidence that would meet all elements for entitlement to second injury relief.

In so doing, the Court of Appeals rightly noted that the Board majority had reached its decision after considering its view of "a preponderance of credible evidence." *Puget Sound Energy, Inc.*, 149 Wn. App. at 876 (emphasis added) (internal citation and quotation marks omitted). By so weighing the evidence, even the Board majority, which decided adversely to PSE, acknowledged there was credible evidence to the contrary.

Board member Dickinson noted, as did the Court of Appeals in quoting him, that Dr. Thomas Gritzka had concluded that Lee's pre-existing neck and low back injuries produced losses of physical function which would otherwise qualify for a PPD award under the Department's own permanent impairment classification scheme.

The Court of Appeals correctly found that the CABR contained evidence of differing views of facts fundamental to entitlement to second injury relief. Plainly, this means that issues exist which are proper for a jury to decide.

**C. No Impairment of Wage-Earning Capacity or Loss of Earning Power Need Be Established to Entitle an Employer to Second Injury Fund Relief.**

The Legislature's 1984 amendment to RCW 51.16.120 eliminated even an implicit requirement that an employer had to have knowledge of a worker's preexisting bodily disability in order to be entitled to second injury relief. Neither does the statute require that a worker such as Lee, who started employment with PSE after three significant prior injury events, must require any work accommodation in order to perform required job duties before second injury relief can be granted.

The Department also relies on *Henson v. Dep't of Labor & Indus.*, 15 Wn.2d 384, 130 P.2d 885 (1942). This case, though discussing the theory upon which the Industrial Insurance Act was predicated, was

distinguished by this Court in *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 215 P.2d 416 (1950). In *Franks*, it was noted that the Legislature may have taken the potential impact of a loss of earning power into account in prescribing in dollars the compensation for "specified" permanent physical impairment under RCW 51.32.080(1)(a) and in fixing a maximum dollar amount to compensate for "unspecified" impairments to other nonlisted areas of the body under RCW 51.32.080(3). However, the right to receive compensation for PPD does not have a loss of earning power as a fundamental prerequisite.

The Court in *Franks* stated that such "unspecified" PPD involved only the loss of bodily function and was to be measured not by the loss of earning power, but by the relationship between such impairment (cervical spine and lumbar spine impairments being two types of unspecified disabilities) and other "specified" disabilities specifically listed in RCW 51.32.080(1). The analysis in *Franks* is wholly in accord with the Department's special rules for evaluating permanent bodily disability in WAC 296-20-220, first promulgated in 1974.

Accordingly, two workers with precisely the same injury to the neck, for example, would be awarded identical percentages of permanent partial disability. Although one worker may have a loss of earning power as a result, the other may have no lost earning power; however, both

would be considered, as a matter of law, to have a permanent impairment/disability which would be cognizable under RCW 51.16.120 as a previous bodily disability in the event a later injury resulted in either worker's permanent total disability.

This Court's recent decision in *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 201 P.3d 1011 (2009) is fully in accord with the well-settled pronouncements set forth in *Franks* and went a step further to distinguish compensation for a permanent loss of bodily function, i.e., PPD, from a worker's subsequent job performance of physical tasks. Citing *Clauson v. Dep't of Labor and Indus.*, 130 Wn.2d 580, 585, 925 P.2d 624 (1996), this Court reinforced a recognition that, unlike the other disability classifications, PPD is exclusively defined as a loss of bodily function. It follows that a loss of bodily function that is manifest as a "previous disability" under RCW 51.16.120 does not require that an injured worker be unable to perform his or her job functions. *Harry*, 166 Wn.2d at 8.

This Court further recognized that, most certainly, the inability to work is the standard for entitlement to permanent total disability benefits under RCW 51.08.160, with the same being true for temporary total disability benefits under RCW 51.32.090. *Harry*, 166 Wn.2d at 8. Those disability classifications are not what is contemplated as a previous bodily disability under RCW 51.16.120.

**D. The Department's Rules for the Evaluation of Permanent Impairment Are in Accord with PSE's Eligibility for Second Injury Fund Relief.**

The Department administers claims for permanent partial disability under a classification scheme commencing at WAC 296-20-220, bearing the heading "Special rules for evaluation of permanent bodily impairment." This section clearly denotes and defines the nature of permanent bodily impairment that is entirely consistent with the Court of Appeals in *Lee* and this Court's holding in *Tomlinson*. The Department's rule incorporates "impairment" to mean a loss of physical or mental function and sets forth that evaluation of impairment levels are called "categories." The rule states that the rules describe categories for various bodily areas that are intended to be a comprehensive system for the measurement of disabling conditions not already provided for in the list of specific permanent partial disabilities in RCW 51.32.080(1).

Most pertinent to this Court's decision in determining whether PSE has submitted credible evidence to support that Lee had previous bodily disability under RCW 51.16.120 is WAC 296-20-220(1)(h):

When the examination discloses a preexisting permanent bodily impairment in the area of the injury, the examiner shall report the findings and any category of impairment appropriate to the worker's condition prior to the industrial injury in addition to the findings and categories appropriate to the worker's condition after the injury.

It is precisely evidence of this nature that Dr. Gritzka's testimony provided when he stated that Lee had preexisting disability equal to Category 2 impairments both to his neck, under WAC 296-20-240, and to his low back, under WAC 296-20-280. CABR Gritzke (67, 75, 78). Recognizing that evidence in the dissent to the Board majority's decision and stating that those preexisting physical impairments were necessary contributing causes of Lee's eventual total disability are clear expressions of a differing view of the facts than that found by the Board majority for which the law provides to PSE a right to jury review.

It is paramount to understand that neither a Category 2 disability of the cervical spine nor a Category 2 impairment of the lumbar spine require that subjective complaints of pain be continuously present in order to receive monetary compensation for PPD. The Department's rules state specifically that Category 2 impairments of the cervical and lumbar spines include the "presence or absence of pain." WAC 296-20-240(2), -280(3). For the Department to assert that a "previous bodily disability" under RCW 51.16.120 requires that continuous pain and symptoms be present necessitating workplace accommodations before a prior bodily disability can be recognized for second injury purposes flies in the face of its own rating system for awarding monetary compensation for permanent partial disability.

The Department's petition mischaracterizes the Court of Appeals reasoning behind its conclusion that the trial court erred. Even if there were no dispute—as there clearly is in this case—regarding the existence of a previous bodily disability, PSE fully acknowledges that it will have the burden of establishing that Lee's permanent total disability resulted from the combined effects of the impairment from his 1992 industrial injury superimposed upon his previous bodily disability from his prior injuries.

**E. Whether Lee's Previous Bodily Disability Is a Significant Contribution to His Permanent Total Disability Is an Issue that Lies Within the Province of a Jury.**

The Department argues that if a previous bodily disability is "quite minimal in effect," it would be inappropriate to consider such impairment as a significant cause of permanent total disability for an employer to be eligible for second injury fund relief. PSE may tend to agree with that proposition; however, the Department's argument misses the point of PSE's right to a jury trial. Their argument on the severity of a prior permanent impairment/disability should go to the weight of evidence to be considered by a trier of fact. Most certainly, a jury would be able to determine whether Lee's previous bodily disability, under the evidence presented in this case as detailed by the Court of Appeals, was significant or insignificant in its impact on him. That is, whether Lee's previous bodily disability was necessary to combine with effects from his 1992 PSE

injury to produce permanent total disability, is inherently a factual determination which is at the core of the "combined effects" element required for second injury fund relief. That, however, is clearly an issue for the trier of fact to decide, and which the Court of Appeals recognized was present in testimony for a jury to consider in this case.

**F. No Significant Question of Constitutional Law or Other Alleged Issue of Substantial Public Importance Warrants Further Review.**

The Department's petition does not assert that review should be granted because a significant question of law under the Constitution of the State of Washington or of the United States is involved. Its assertions that the case presents issues of substantial public interest that should be determined by the Supreme Court as required by RAP 13.4(b) are without merit.

One of those issues relating to the necessity of loss of earning power is addressed supra. The other relates to a concern for "overuse" of the second injury fund. In short, that if granted to employers too liberally, its purpose and effectiveness will be eroded, and a much greater financial burden will be placed on all employers. PSE submits that such argument is spurious and flies in the face of the strong public policy encouraging the hiring of workers with physical and mental impairments. Moreover, any such question of that nature should lie exclusively within the role of the

state legislature to address, even if it were a true concern. This Court should not give any weight to such an illusory concern in deciding whether to grant or deny the Department's petition.

## V. CONCLUSION

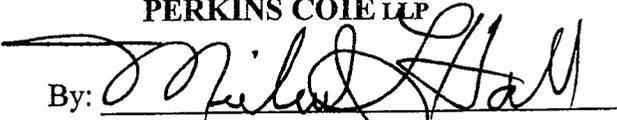
There is no reason to review this case because the decision of the Court of Appeals does not conflict with any decision of this Court or the Court of Appeals, nor does the Court of Appeals' decision raise any question of constitutional law or present any other issue of substantial public importance warranting review.

The Court of Appeals correctly held that the trial court erred in striking PSE's right to a jury trial. Their decision means only that PSE must prove its case to a jury, period.

For the reasons set forth above, Puget Sound Energy, Inc. respectfully requests that this Court deny the Petition for Review of the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 14th day of August, 2009.

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**CERTIFICATE OF SERVICE**

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2009 AUG 14 P 3: 32  
BY RONALD KROGER, CLERK

The undersigned declares:

I am employed by Perkins Coie in the County of King, Seattle, Washington. I am over the age of 18 years and not a party to the within action; my business address is 1201 Third Avenue, Suite 4800, Seattle, Washington 98101.

On this date, I caused a true copy of the foregoing document to be served on the following individual(s) by hand delivery:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of August, 2009.



\_\_\_\_\_  
Carol Kness