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No. 61179-8

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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COURT OF APPEALS  
STATE OF WASHINGTON  
2008 APR 11 PM 1:29

PUGET SOUND ENERGY, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE  
OF WASHINGTON and ROBERT LEE,

Respondents.

BRIEF OF APPELLANT

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## I. INTRODUCTION

### A. Superior Court Action Striking Jury and Proceeding to Bench Trial.

This case arose from an appeal by Puget Sound Energy ("PSE"), a self-insured employer, to superior court from a final order of the Board of Industrial Appeals (the "Board"), which denied PSE's request for second injury fund relief under RCW 51.16.120. PSE had sought jury review of the Board's decision.

After the deadline for dispositive motions had passed and approximately three weeks before the scheduled trial date, the Department of Labor and Industries (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 discretionary review of that motion to the Court of Appeals which was denied. The case then proceeded to a bench trial, 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 Robert R. Lee ("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 commencing PSE employment, or that he 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.

The superior court's conclusions are directly contrary to well-established Washington authority. Washington courts and the Board have repeatedly and consistently found that where a worker has suffered a permanent impairment of his or her physical capacity to work prior to a further disabling industrial injury, the worker qualifies as having a "previous disability" under RCW 51.16.120 — *whether or not the impairment was known to his or her employer and even when the worker was able to obtain or maintain gainful employment prior to the industrial injury.*

Accordingly, pursuant to well-settled Washington law, PSE requests this Court to reverse the superior court's decision and remand this case for a trial by jury to determine disputed factual questions relating to PSE's entitlement to second injury fraud relief under RCW 51.16.120.

**B. Factual Background Supporting Preexisting Disability.**

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. In early 1992, Lee commenced a brief period of employment as a lineman with PSE. Lee's previous injuries had permanently impaired his

ability to perform fundamental aspects of work duties as a lineman, including heavy lifting, tugging and reaching over his head. Nonetheless, Lee, a former Navy SEAL whose practice was to "tough it out," continued to work, admitting that he had to rely on his union brothers to cover for him in performing job duties he could not do without such assistance. In addition, prior to his PSE employment, Lee continually used prescription medication and chiropractic care to manage his pain and physical restrictions.

On October 5, 1992, a few months after starting work at PSE, Lee sustained a *fourth* injury affecting his shoulder and ultimately his neck which eventually also became debilitating. He continued working thereafter for four months until laid off by PSE. He subsequently moved to California and resumed work running linemen crews. After several months, he again sought medical attention for his persistent arm and neck symptoms. More than ten years later, in 2004, the Department awarded Lee a pension as a permanently totally disabled worker. At the same time, the Department denied PSE's request for second injury fund relief. The denial was narrowly affirmed by the Board.

## II. ASSIGNMENT OF ERROR

The superior court erred in striking the jury and proceeding to hear PSE's appeal as a bench trial. The superior court erred in affirming the

Board's Decision and Order dated September 19, 2006, which had denied PSE second injury fund relief provided under RCW 51.16.120.

### **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Did the superior court err in concluding as a matter of law that PSE was not entitled to second injury fund relief under RCW 51.16.120 because Lee (a) was not symptomatic at the start of or during the course of his employment with PSE and (b) did not require, request or receive any formal accommodation from PSE to perform his job duties prior to the date of his industrial injury on October 5, 1992?

2. Did the superior court err in concluding as a matter of law that PSE was not entitled to second injury fund relief because Lee did not suffer from a permanent disability that adversely affected his wage-earning ability prior to the date of his industrial injury on October 5, 1992?

3. Did the superior court err in striking the jury and concluding as a matter of law that PSE was not entitled to second injury fund relief where disputed questions of fact existed as to whether Lee had any preexisting disabling conditions which, when combined with impairment from his industrial injury on October 5, 1992, proximately caused his permanent total disability?

#### IV. STATEMENT OF THE CASE

**A. During His 22-Year Career as a Lineman Preceding His Employment by PSE, Lee Suffered Multiple Debilitating Injuries, Both On and Off the Job, That Prevented Him from Performing His Full Job Duties.**

Robert R. Lee suffered at least three debilitating injuries during his 22-year work career as a lineman prior to his employment with PSE in 1992. Testimony of Robert R. Lee in the Board's Certified Appeal Board Record referenced in CP's as Sub #12 ("CABR Lee testim.") at 14:1-13, 104:10-21.

**1. 1978 neck and shoulder injury.**

In 1978, while working as a lineman in central Oregon, Lee seriously injured his right shoulder and neck. CABR Lee testim. at 71:14-31. His resulting physical impairment led to his layoff by his employer at the time. *Id.* at 75:1-10. Lee testified that as a result of the injury, he posed a danger to those working below him because of his inability to grasp tools to prevent them from dropping. *Id.* at 74:1-75:29. The injury rendered Lee incapable of performing his job, and he was laid off because he was the "weak link." *Id.* at 75:12-21.

Lee thereafter continued to experience neck and arm restrictions and pain. *Id.* at 75:23-29, 76:33-39. Despite the physical impairment caused by his injury, Lee "toughed it out." As a Navy SEAL, Lee's attitude was simply not to let the restrictions from an injury hold him back.

*Id.* at 34:51-35:17. Lee testified that he eventually obtained other jobs and continued working with the help of prescription medication and chiropractic care to lessen his pain symptoms. He plainly admitted he relied on his union brothers, who covered his job duties when needed:

Q. When . . . now, as a union hall worker, and I take it you mentioned IBEW, that really is a brotherhood, isn't it?

A. Yes, sir, it is.

Q. And people who work for that brotherhood, they support each other, don't they?

A. They do.

Q. And if somebody is not able to do everything on a job, that they are assigned to do, do their brothers out there help them?

A. They do.

Q. Did you do that for people who needed it when they needed it?

A. I did.

Q. And did people do that when you needed it?

A. They have.

Q. But you would tend to work regardless of illness, or injury, is that just the way you are wired, Mr. Lee?

A. It takes a lot to make me say uncle.

Q. So you would work even when you were hurting?

A. Yes.

Q. How common was that for you prior to your injury at [PSE]?

A. It's been common for me all my life.

*Id.* at 35:19-36:13.

**2. 1981 back injury.**

In 1981, Lee suffered a traumatic spondylolysis in his lumbar spine as a result of being pinned in a lineman bucket while sawing a utility pole.

*Id.* at 56:1-59:28, 65:2-15. Off work for six months from that injury, Lee

continued to experience low back symptoms and had to seek lighter work

within the same industry. *Id.* at 65:17-44, 66:1-12. He subsequently

obtained a position as a "nonworking" foreman in Alaska, which

accommodated his neck and low back limitations. *Id.* at 66:30-42. Lee

nonetheless experienced limitations on his job performance:

Q. Did those problems with your low back and pain down your leg did that restrict your ability to do your job effectively to some extent?

A. Yes.

Q. In what ways?

A. Well, the inability to do heavy lifting and tugging and everything that goes with the program.

Q. Is that when your buddies, the brotherhood would help you with some of your duties?

A. Yes.

Q. So you have helped them before, and this is now your turn to be helped?

A. Yes, sir.

Q. And, otherwise, you simply had to find ways to accommodate what the job duties required, is it fair to say?

A. Yes, sir.

Q. But that sometimes included asking other people to help?

A. Yes, sir.

*Id.* at 61:44-62:31.

Following his back injury in 1981, Lee commonly used prescription pain and anti-spasm medications to manage his pain and physical restrictions. *Id.* at 68:17-69:1, 61:21-42. He continued, furthermore, to ask his coworkers for help with his job duties:

Q. After that '81 injury, and before the injury in 1992 at [PSE], about how much of the time, what percentage of the time would you have symptoms that would bother you from your low back, as you understood it, that would affect . . . that you notice symptoms. What percentage of time would you have those?

A. I don't know, maybe, 30 percent of the time. It would . . . I would have flare-ups where it would really hurt to be in the hooks, and then I would have days that I didn't have problems with it.

Q. And because of those would you have to alter the way you did your job duties sometimes?

A. Yes.

Q. And would you, at times, again, have to ask others for help?

A. I would.

Q. You asked them in instances where you wouldn't have had to ask them if your back was a hundred percent?

A. Yes.

*Id.* at 69:37-70:21.

### **3. 1987 neck and back injury.**

In late 1987, while living and working in California, Lee suffered a nonindustrial injury affecting his neck and back. *Id.* at 77:23-79:10. That injury interfered with his ability to work even as a crew supervisor and led him to seek chiropractic care and further medical attention. *Id.* at 81:19-82:15. A magnetic resonance imaging study in February 1988 showed bony pathology in his cervical spine. *Id.* at 82:12-17. Lee subsequently experienced physical pain and restrictions that impaired his work performance:

Q. Now, through the year after 1988 did those problems continue off and on?

A. Yes, they would –

Q. Did they?

A. They would subside, and I would go, you know, sometimes several months without an episode, but sometimes –

Q. What kind of limitations would those cause for you in your work and your everyday life?

A. They would be painful, and they would be restrictive.

Q. In what way?

A. Inability to do anything without the constant pain nagging, having to position yourself just so, limiting you on what you could lift.

Line work is basically No. 3 hardhat, and a 40 T-shirt. Everything you do is working against body mechanics. You are working laying back in a belt and reaching over your head.

Q. So would you have trouble reaching overhead when you were having the problems?

A. Yes.

Q. And you had to be careful in what you lifted, and how much you lifted?

A. Yes.

Q. You would have to call on others to help you throughout the years for when these problems happened?

A. From time to time.

*Id.* at 82:35-83:38.

**B. During His Brief Period of Employment with PSE, in 1992, Lee Sustained an Industrial Shoulder and Back Injury.**

Several months after commencing employment as a lineman with PSE, on October 5, 1992, Lee injured his right hand and shoulder, an injury that later was diagnosed as affecting his neck, i.e., his cervical spine. *Id.* at 21:21-22:12. Despite his injury, Lee continued to work for PSE until he was laid off a few months later, in February 1993. *Id.* at 43:21-44:38. He then moved to California and obtained new employment. *Id.* at 45:1-15. As in his previous jobs, Lee continued to "let[] his colleagues do the heavy work." *Id.* at 46:19-28.

**C. In 2004, the Department of Labor & Industries Awarded Lee a Pension as a Permanently Disabled Worker, but Denied PSE's Request for Second Injury Relief Under RCW 51.16.120.**

Lee's neck and back conditions deteriorated in subsequent years and ultimately required several surgeries on conditions in his cervical spine that had existed prior to his 1992 injury. *Id.* at 23:14-17, 87:19-42. On September 13, 2004, the Department awarded Lee a pension as a permanently totally disabled worker. CP at 141. By a separate order dated September 14, 2004, the Department denied PSE's request for second injury fund relief under RCW 51.16.120.<sup>1</sup> *Id.*

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<sup>1</sup> RCW 51.16.120(1) states, in relevant part:

Whenever a worker has a previous bodily disability from any previous injury or disease, whether known or unknown to the

**D. The Board of Industrial Insurance Appeals Narrowly Affirmed the Department's Denial of Second Injury Fund Relief to PSE.**

PSE appealed the Department's denial of second injury fund relief to the Board. Dr. Thomas Gritzka testified that Lee had preexisting permanent low back impairment, ratable as a permanent partial disability. Deposition of Dr. Thomas Gritzka ("CABR Gritzka Dep.") at 67:12-25. Dr. Gritzka explained that although Lee was not precluded from work prior to his 1992 industrial injury, he nonetheless had a permanent preexisting impairment that affected his physical capacity for work. *Id.* at 90:3-19, 100:11-101:1. According to Dr. Gritzka, but for the combined effects of preexisting impairment superimposed upon impairment from the 1992 injury, Lee would not have become permanently disabled.<sup>2</sup> *Id.* at 87:10-24.

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employer, and shall suffer a further disability from injury or occupational disease in employment . . . and become totally and permanently disabled from the combined effects thereof, then said further injury or disease shall be charged and a self-insured employer shall pay directly into the reserve fund only the accident cost which would have resulted solely from said further injury or disease, had there been no preexisting disability . . ."

<sup>2</sup> In contrast to Dr. Gritzka's testimony, the testimony of Dr. Scott Stoney and Dr. William Dobkin revealed a lack of knowledge about Lee's prior injuries, and the limiting effects of such injuries on Lee's capacity to work. Dr. Stoney's opinion that Lee's 1992 PSE injury was the sole cause of Lee's permanent disability was based on the fundamentally erroneous assumption that the PSE injury was Lee's first experience with neck and/or shoulder problems. Deposition of Dr. William Dobkin at 49:1-7; Deposition of Dr. Scott Stoney ("CABR Stoney Dep.") at 38:8-11. Dr. Stoney's testimony was also based on his incorrect understanding that Lee had never returned to work at all in any capacity after the 1992 injury. CABR Stoney Dep. at 27:23-28:1.

On September 18, 2006, the Board issued a decision and order affirming the Department's orders. CP at 2-8. The Board's denial of PSE's request for second injury fund relief was based on the finding of two Board members that Lee was able to perform heavy work without restriction prior to his 1992 industrial injury and had no physical or mental condition that was partially disabling. *Id.*

A dissenting Board member took issue with the majority's findings, stating:

With due respect for my esteemed colleagues, I dissent from the failure to award second injury fund relief in this unusual case. Fundamental to understanding this case is a recognition that Mr. Lee is a remarkably stoic individual, a former Navy Seal who suffered from, and worked with, multiple physical problems, but totally failed to recite his past medical history to either of the physicians who found that Mr. Lee's total disability was due to the industrial injury without contributions from prior problems. Mr. Lee's prior problems were discovered by Dr. Thomas L. Gritzka who correctly concluded not only that Mr. Lee had prior neck and back problems, but that they were each Category 2 disabilities under our law and were necessary contributing causes to his eventual total disability.

CP at 6-7.

**E. PSE Appealed the Board's Decision to Superior Court and Filed a Jury Demand.**

PSE originally appealed two aspects of the Board's decision to superior court: (1) the determination that Lee was permanently totally

disabled, and (2) the denial of second-injury relief, if Lee was found to be permanently totally disabled. PSE then timely filed a six-person jury demand. CP at 1-2, 118.

With the agreement of the parties, the court thereafter entered a stipulated order affirming the Board's decision that Lee was permanently totally disabled. CP at 86-88. The stipulated order expressly reserved for trial the issue of whether PSE was entitled to second injury fund relief. CP at 88.

**F. Although Issues of Fact Were in Dispute as to Whether Lee Had Suffered a "Previous Disability" Under RCW 51.16.120, the Superior Court Struck the Jury and Affirmed the Board's Denial of Second Injury Fund Relief to PSE as a Matter of Law.**

After the case schedule deadline passed for filing dispositive motions, the Department filed a motion to strike the jury, asserting the evidence was "overwhelming" that Lee did not suffer from any preexisting disabling condition at the time of his 1992 industrial injury and that the PSE injury alone resulted in Lee's total permanent disability. CP at 103-08. Over PSE's objection, the superior court granted the Department's motion to strike the jury. CP at 109-18, 120-21. After denying PSE's motion for reconsideration, CP at 135-48, 286-87, the court ordered the case to be tried to the bench. CP at 385-86. The court's order contained a handwritten notation that "[a]t the time of the accident in 1992, Lee was

working as a lineman without restrictions or accommodations needed."

CP at 386.

PSE filed a motion for discretionary review of the superior court's order with the Court of Appeals, which was denied. CP at 400-07.

Following a bench trial, the superior court affirmed the Board's denial of second injury relief to PSE. The court entered the following conclusions of law:

3. Where, prior to the occurrence of a disabling industrial injury, a worker (a) is not symptomatic at the time of commencing employment with an employer and does not become symptomatic during the performance of work duties for an employer, nor (b) requires any accommodation to perform his or her job, nor (c) is limited in the ability to perform his or her job for an employer, such worker, as a matter of law, does not have any previous bodily disability from any previous or disease cognizable under RCW 51.16.120 which would entitle the employer at the time of a later-occurring industrial injury to such worker to second injury fund relief.

4. Because no evidence in the [certified appeal board record] supports that Lee (a) was symptomatic at the time of commencing employment as a lineman with Puget Sound Energy, and did not require, request, receive or need any accommodation in order to perform all assigned job tasks and duties in his work position as lineman for PSE prior to the date of his injury on October 5, 1992, PSE is not entitled to second injury fund relief under the provisions of RCW 51.16.120.

5. Alternatively, as a matter of law, PSE is not entitled to second [injury] fund relief under the provisions of RCW 51.16.120 because there is no

evidence that, prior to Lee's injury on October 5, 1992, he suffered from permanent disability that adversely affected his wage-earning ability.

CP at 408-12.

PSE timely filed this appeal on January 25, 2008. CP at 416.

## V. ARGUMENT

### A. Standard of Review.

Conclusions of law are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

### B. Second Injury Fund.

The Second Injury Fund, RCW 51.16.120, was established by the Washington State Legislature to "encourage the hiring of previously handicapped workmen" and also to advance one of the purposes of the Workers' Compensation Act which is "to reward, and thereby encourage, [workplace] safety, as well as to avoid an unfair burden on other employers." *Jussila v. Dep't of Labor & Indus.*, 59 Wn.2d 772, 778-79, 370 P.2d 582 (1962). To accomplish these purposes, the second injury fund provides that an employer will not, in the event a handicapped worker suffers a subsequent injury on the job, be financially liable for a greater disability than actually results from the second accident in terms of the monetary equivalent of a permanent partial disability were awarded for the increase in loss of physical or mental function. *See id.* at 778.

RCW 51.16.120 thus identifies three prerequisites to the application of the second injury fund when permanent total disability benefits are awarded. The worker must have: (1) suffered a preexisting disability from any occupational or nonoccupational injury or disease, whether known or unknown to the employer; (2) incurred a later industrial injury producing a further physical or mental impairment; and (3) become permanently totally disabled as a result of the combined effects of both. *Seattle School Dist. No. 1 v. Dep't of Labor & Indus.*, 116 Wn.2d 352, 804 P.2d 621 (1991), .

**C. The Superior Court Erred in Concluding That PSE Was Not Entitled to Second Injury Fund Relief Under RCW 51.16.120 Because Lee Lacked a "Previous Disability" as a Matter of Law.**

**1. Lee suffered a "previous disability" under RCW 51.16.120 if he experienced a permanent impairment of his physical capacity to perform his job duties.**

RCW 51.16.120 requires that a preexisting condition be disabling to some extent before the industrial injury occurred. *Donald W. Lyle, Inc. v. Dep't of Labor & Indus.*, 66 Wn.2d 745, 748, 405 P.2d 251 (1965).

Although the statute does not define the term "disability," Washington courts and the Board have consistently and repeatedly interpreted the term to mean a condition that has *permanently impaired a worker's physical or mental functioning and thereby his former capacity to engage in regular daily activities and/or to perform his job duties*. See, e.g., *Henson v. Dep't*

*of Labor & Indus.*, 15 Wn.2d 384, 391, 130 P.2d 885 (1942) ("Disability" within Workman's Compensation Act means the "impairment" of a worker's "mental or physical efficiency."); *In re Sandra McKee*, BIIA Dec. No. 04 14107, 2007 WL 1413127, at \*6 (Wash. Bd. Ind. Ins. App. 2007) ("To be disabling, a preexisting condition must have had a substantial permanent impact on a worker's functioning. The disability must have clearly detracted from an individual's ability to engage in the ordinary pursuits of life"); *In re Carol A. Connor*, BIIA Dec. No. 00 10267, 2002 WL 31427042, at \*3 (Wash. Bd. Ind. Ins. App. Sept. 11, 2002) (A "pre-existing condition must be shown to have been actually disabling in some manner, i.e., productive of a handicap"); *In re Forrest Pate*, BIIA Dec. No. 90 4055, 1992 WL 160673, at \*2 (Wash. Bd. Ind. Ins. App. May 7, 1992) (a "'pre-existing disability' . . . must, in some fashion, permanently impact on the worker's physical and/or mental functioning"); *cf. In re Leonard Norgren*, BIIA Dec. No. 04 18211, 2006 WL 481048, at \*6 (Wash. Bd. Ind. Ins. App. Jan. 12, 2006) ("a case for second injury fund relief is not made where the evidence . . . does not show that [prior medical conditions] had a substantial negative impact on the worker's physical or mental functioning").

In *Henson*, the Washington Supreme Court authoritatively addressed the meaning of "disability" in the context of the Workmen's Compensation Act:

Disability means the impairment of the workman's mental or physical efficiency. It embraces any loss of physical or mental functions which detracts from the former efficiency of the individual in the ordinary pursuits of life. It connotes a loss of earning power.

15 Wn.2d at 391. Based on this interpretation, the court in *Henson* found that a mineworker who had contracted the disease of silicosis, the symptoms of which included "shortness of breath, decreased chest expansion and lessened capacity for work," was entitled to workers' compensation benefits. *Id.* at 386-88.

The Board has uniformly applied the *Henson* interpretation of "previous disability" in awarding second injury fund relief to employers. For example, in *In re Sandra McKee*, 2007 WL 1413127, at \*3 (Wash. Bd. Ind. Ins. App. 2007), the Board determined that a sign painter's preexisting learning and mental health impairments were disabling because they required ongoing treatment and limited her vocational options.

In *In re Lance Bartran*, BIIA Dec. No. 04 21232, 04 23432 & 04 23522, 2005 WL 3802552, at \*2, 4 (Wash. Bd. Ind. Ins. App. Nov. 16, 2005), the Board concluded that the worker's preexisting schizoid

personality disorder constituted a mental illness "affecting the entire person" that "limited [his] ability to obtain and perform the full scope of his employment potential."

In *In re Marshall H. Powell*, BIIA Decision No. 97 6424 (Wash. Bd. Ind. Ins. App. July 21, 1999), the Board concluded that a diabetic worker's "need for monitoring diet and insulin level, and the peripheral neuropathy in both feet, had to have substantially and negatively impacted [the worker's] daily functioning and efficiency" and thus, the worker's diabetes was "disabling" for purposes of second injury fund relief.

Conversely, where a worker's preexisting condition was *not* shown to have permanently impaired his or her mental or physical functioning and, correspondingly, the worker's capacity to perform his or her work duties, Washington courts have uniformly denied second injury fund relief to employers. For example, in *Lyle* the Washington Supreme Court held that the worker's preexisting condition of degenerative arthritis did not impair his physical functioning or capacity to work until it was "lighted up," or aggravated, by his industrial back and hip injuries. 66 Wn.2d at 746.

Likewise, in *Rothschild International Stevedoring Co. v. Department of Labor and Industries*, the court of appeals held that no disability existed prior to the worker's ultimate industrial injury where the

worker suffered from temporarily disabling injuries, including two back sprains, a shoulder injury and a foot injury, which did not prevent him from "doing 'everything' required of a longshoreman" up until the time of his ultimate injury. 3 Wn. App. 967, 969-70, 478 P.2d 759 (1971).

The Board has similarly denied second injury fund relief where a worker's preexisting condition has not resulted in permanent impairment of the worker's physical or mental capacity to perform his or her job duties. In *In re Leonard Norgren*, the Board determined that a worker with a preexisting cervical and low back arthritic condition, hearing loss, a glaucoma condition, and a knee condition requiring cortisone injections "on rare occasions" was not sufficient to prove that the worker was disabled prior to his industrial injury where his work history showed that he worked medium-duty jobs, averaging over 60 hours per week for over 37 years, was driving at night, and was not seeing doctors regularly. 2006 WL 481048, at \*6-7.

In *In re Forrest Pate*, the Board determined that a worker's prior health and medical conditions requiring periodic medical attention were not sufficient to establish a preexisting disability where they did not appear to affect his mental or physical functioning or his capacity to work. 1992 WL 160673, at \*2-3.

In *In re Alfred C. Funk*, the Board found no preexisting disability where a logger testified that his congenital heart condition and degenerative arthritis did not interfere with his work and were not conditions for which he received any treatment. BIIA Dec. No. 89 4156, 1991 WL 87432, at \*2 (Wash. Bd. Ind. Ins. App. Feb. 4, 1991). *Accord In re Curtis W. Anderson*, BIIA Dec. No. 88 4251, 1990 WL 310624, at \*2 (Wash. Bd. Ind. Ins. App. June 15, 1990) (a worker's preexisting conditions were not disabling prior to his industrial injury where he had been "fully able to perform his demanding job duties as a logger").

Unequivocally, the testimony record in Lee's case demonstrates that impairments of Lee's neck and low back did qualify as a "previous disability" under RCW 51.16.120. Substantial evidence shows such conditions permanently detracted from Lee's full capacity to consistently perform job duties.

2. **Lee's preexisting impairment need not have been symptomatic nor required an accommodation during his employment with PSE to qualify as a "previous disability" under RCW 51.16.120.**

The superior court was incorrect in concluding that Lee did not have a "previous disability" as a matter of law. The superior court's interpretation of the evidence that (1) Lee was not symptomatic when he started employment with PSE and (2) Lee did not request or receive an

accommodation at the time of his hire or during his employment with PSE are undeniably findings of fact. Such findings could be viewed differently by a jury as a trier of fact based on Lee's admission of needing assistance to perform job duties with earlier employers. However, even if a jury were to reach the same conclusion, that fact does not mean Lee did not have a previous disability for purposes of determining entitlement to second-injury relief.

Essentially, the superior court's conclusion is that for an employer to benefit from second injury fund relief, the previous disabling physical condition upon which the relief is premised must be manifest and known by the employer at the time the worker was employed. The superior court's conclusion is *squarely contrary* to the express language and purpose of RCW 51.16.120 and is not supported by *any* competent authority. *Cf. Powell*, BIIA Dec. No. 976424 at \*2 (to prevail in a second injury fund relief claim, an employer need not show knowledge at the time of hire or in the course of employment of the injured worker's previously disabling condition).<sup>3</sup>

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<sup>3</sup> Courts with worker's compensation statutes similar to that of Washington's have similarly rejected a requirement that the employer have knowledge of an employee's previous disability. See *Jacques v. H.O. Penn Mach. Co.*, 349 A.2d 847, 852 (Conn. 1974) ("The employer-knowledge and manifestation rules must be rejected if the goal of alleviating the burden on employers while assuring full protection for employees is to be achieved."); *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 215 (Mo. Ct. App. 1999) (*overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220,

The Legislature amended RCW 51.16.170 in 1984 specifically to clarify that employer knowledge of the injured worker's preexisting disability is *not* a requirement for second injury fund relief. Laws of 1984, ch. 63 §1. The statute now expressly provides that a worker's previous disability, "*whether known or unknown to the employer*" entitles an employer to second injury fund relief. RCW 51.16.120(1) (emphasis added). The legislative sponsor of the 1984 amendment, Senator Talmadge, explained the amendment's purpose as follows:

The fund was created as an inducement to employers to hire workers who were handicapped. The problem has been, in my judgment, that through an administrative interpretation by the Department [], they have taken the position that the employer at the time of hiring of the individual had to know of the existence of the disability. The difficulty is quite frankly that some employees will not indicate that they've had previous disabilities or disabling injuries, and absent a very thorough pre-employment physical or a series of questions \_\_\_\_\_ to run afoul of guidelines now established by the State Human Rights Commission with respect to the hiring of the handicapped, the employer is not going to be able to know of the existence of the handicap.

*Powell*, BIIA Dec. No. 976424, at \*7-8 (quoting Sen. Talmadge).

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222- 23 (Mo. 2003)) ("The preexisting disability need not be known by the employee or the employer, prior to the work injury, to establish Fund liability."); *see also Ferguson v. Indus. Accident Comm'n*, 50 Cal. 2d 469, 475, 326 P.2d 145 (1958) ("[No statute or caselaw] requires that *the employer have knowledge* of the employee's preexisting condition as a basis for a Subsequent Injuries Fund claim by one who already is permanently partially disabled [and who] receives a subsequent compensable injury."); *Subsequent Injury Fund v. Rinehart*, 280 A.2d 299, 301 (Md. Ct. Spec. App. 1971) (brain tumor that was undiagnosed at time of injury was preexisting disability).

Lee's counsel admitted that Lee's case "well illustrates" the scenario that the amendment sought to address:

Here a skilled and well paid worker, whose skills are not transferable, suffered serious injuries from time to time in a dangerous occupation. Knowing that disabilities are not tolerated in this field, and not having any education which will permit viable alternatives, he moves to another state and starts over. If he has pain from his previous injuries he works through it and keeps going. If he suffers another injury, he discloses no history of previous injuries. Throughout his work life, he denies that he has any disabilities.

CP at 408.

The superior court's conclusion improperly penalizes employers of workers who, like Lee, seek to stay in the labor market, working at their jobs in the face of chronic pain. The effect of the superior court's conclusion from a policy point is to put employers on notice that there is a financial disincentive to hire employees who may be choosing not to disclose or admit to having disabilities. The policy of the state in making second injury relief available is to create an incentive to provide employment to willing workers, not to look for reasons to eliminate them from employment. Encouraging reliance on the availability of second injury relief reduces employers' risk of having to pay for a total disability that is not solely due to an injury in their workplace. This is precisely the result that the second injury fund theory sought to avoid. *See Jussila, 59*

Wn.2d at 778-79.

In light of the express language and clear intent of the statute *not* to require employer knowledge of a worker's previous disabilities, the superior court plainly erred in concluding that Lee's preexisting impairment must have been symptomatic or received an accommodation upon his hire or during his employment by PSE to qualify as a "previous disability" under RCW 51.16.120.

**3. Lee's preexisting impairment need not have interfered with his ability to obtain or maintain employment prior to his 1992 injury to qualify as a "previous disability" under RCW 51.16.120.**

The superior court was incorrect in concluding that Lee did not have a "previous disability" as a matter of law because his preexisting impairment was not an obstacle to employment prior to his 1992 injury with PSE. To the contrary, a factual issue is raised over whether Lee was forced to seek lighter forms of lineman work as a result of physical limitations from his three previous injuries. The record supports that he was. CABR Lee testim. 37:12-51, 61:21-62:31, 69:37-70:15.

The Board has consistently and repeatedly determined that where a worker's previous condition has permanently diminished his daily functioning and efficiency, it need not also have prevented him from employment to qualify as a "previous disability" under RCW 51.16.120.

In *In re McKee*, the City of Seattle was initially denied second injury fund relief principally based on the determination that the injured worker's mental health and learning impairments were not disabling because she was able to work successfully without restrictions as a sign painter before she developed an industrial disability. 2007 WL 1413127, at \*1. The Board rejected this determination as incorrectly based on an "overly narrow interpretation" of the statute. *Id.* at \*2. The Board reiterated that:

To be disabling, a pre-existing condition must have had a substantial permanent impact on a worker's functioning. The disability must have clearly detracted from an individual's ability to engage in the ordinary pursuits of life. While disability 'connotes a loss of earning power,' this is not absolutely required provided that the disability substantially and negatively impacts a worker's daily functioning and efficiency.

*Id.* at \*6; accord *In re Bartran*, 2005 WL 3802552, at \*4 (worker's preexisting schizoid personality disorder qualified as a previous disability notwithstanding the Board's finding that "the disability caused by the . . . disorder did not preclude [the worker] from reasonably continuous employment at the job of injury"); *In re Powell*, BIIA Dec. No. 976424, at \*9 (worker's diabetes "substantially and negatively impacted [his] daily functioning and efficiency," and thus, although he was able to work, the worker's condition was "disabling" for purposes of second injury fund relief).

It is only where a worker's condition has *not* permanently diminished his daily functioning that Washington courts and the Board have denied second injury fund relief due to the worker's ability to obtain or maintain employment. *See, e.g., Rothschild Int'l Stevedoring Co.*, 3 Wn. App. at 969-70 (no disability preexisted the worker's ultimate industrial injury where the worker suffered from temporarily disabling injuries which did not prevent him from "doing everything" required of a longshoreman"); *In re Merry L. Sturm*, BIIA Dec. No. 03 14217, 2004 WL 2920936, at \*2 (Wash. Bd. Ind. Ins. App. Oct. 18, 2004) (worker's preexisting patent personality disorder and low grade depression were not disabling as evidenced by her successful academic performance, her ability to obtain and maintain employment, and her successful second marriage); *In re Funk*, 1991 WL 87432, at \* 2 (no preexisting disability existed where a logger testified that his congenital heart condition and degenerative arthritis did not interfere with his work and were not conditions for which he received any treatment); *In re Curtis W. Anderson*, 1990 WL 310624, at \*2 (a worker's preexisting conditions were not disabling prior to his industrial injury where he had been "fully able to perform his demanding job duties as a logger").

According to well-established precedent, therefore, Lee's permanent impairment, which under the evidence, a trier of fact could find

had diminished his daily functioning and capacity for physical work, need not have also prevented him from obtaining or maintaining gainful employment prior to the industrial injury to qualify as a disability under RCW 51.16.120. The superior court plainly erred in holding otherwise.

**4. Lee's preexisting impairment need not have caused an actual loss of wage earning capacity to qualify as a "previous disability" under RCW 51.16.120**

Notwithstanding the dicta in *Henson v. Dep't of Labor & Indus.*, stating that a disability "connotes a loss of earning power," 15 Wn.2d at 391, a worker awarded compensation for a permanent partial disability need not have sustained an actual loss of earning power. The Department's rules for guiding a physician's analysis of an injured worker's permanent impairment relate solely to an objective measurable loss of physical function. See WAC 296-20-200 *et seq.*

Only the loss of bodily function, not a measurable loss of earning power, underlies an award of compensation for a permanent partial disability. *Franks v. Dep't of Labor and Indus.*, 35 Wn.2d 763, 774, 215 P.2d 416 (1950). The court in *Franks* noted:

There are many times when it is helpful, in determining the degree of permanent partial disability, to consider whether the claimant is able to do his usual work.

*Id.* at 774.

In making that statement, the court cited *Gakovich v. Dep't of*

*Labor and Indus.*, 29 Wn.2d 1, 184 P.2d 830 (1947). The *Gakovich* court reversed a judgment awarding additional permanent disability where the claimant was still working for the same employer and "doing the same job" he "had always done with them." *Id.* at 7. *Gakovich* involved a worker who had lost the complete sight in his right eye from "a flying piece of rock" while working for a roadbuilding contractor. He received, as a permanent partial disability award, the maximum allowable monetary compensation for the loss of sight in his right eye. Mr. Gakovich, however, returned to his usual job with the same employer. He performed all of the same duties thereafter without any accommodation. The Court reversed the award of additional compensation but not because there was no loss of earning power. The Court did so because there was no objective evidence of greater impairment under rules for rating "unspecified" impairment.

It cannot be denied, however, that had Mr. Gakovich lost the sight of his left eye from a subsequent industrial injury he would have been entitled to an award for permanent total disability under RCW 51.08.160. That section sets forth the definition of permanent total disability and includes in that status the total loss of eyesight.

Had that occurred, Mr. Gakovich's employer would have been entitled to second injury fund relief, notwithstanding that Mr. Gakovich

had previously suffered no loss of earning power or impairment of his wage earning capacity with that company from his first injury causing the total loss of sight in his right eye.

In the Lee case before this Court, the testimony record does not describe whether Lee's job duties at PSE had the same, greater, or less physical demands than job duties he had performed for other employers in the past. The fact that Lee may have not requested nor required an accommodation for his pre-existing permanent impairment (noted by Dr. Gritzka as Category 2 of the cervical spine and Category 2 of the lumbar spine) does not disqualify PSE from being entitled to second injury fund relief under RCW 51.16.120.

Contrary to the reasoning used by the superior court, an employer's entitlement to second injury relief is not dependent upon a worker's seeking any accommodation to perform work tasks with a particular employer. This seems especially so where as Lee's testimony establishes, he was able to make any needed accommodations through the assistance of co-workers covering for him.

**D. The Superior Court Erred in Striking the Jury Where Disputed Questions of Fact Existed as to Whether Lee Had Any Preexisting Disabling Conditions Which, When Combined with Impairment from His Industrial Injury in 1992, Proximately Caused His Permanent Total Disability.**

The essential dispute of this case centers on whether Lee had a preexisting disability prior to his 1992 industrial injury which combined with further impairment from that injury to render him permanently totally disabled. RCW 51.52.115 clearly entitled PSE to a jury trial to resolve this dispute.

**1. PSE was entitled by RCW 51.52.115 to a jury determination on disputed questions of fact.**

By statute, a party appealing to superior court from a final decision and order of the BIIA shall be entitled to a trial by jury upon demand to resolve questions of fact:

*In appeals to the superior court hereunder, either party shall be entitled to a trial by jury upon demand, and the jury's verdict shall have the same force and effect as in the actions at law. Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court.*

RCW 51.52.115 (emphasis added); *see also Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998) (either party is entitled to de novo jury trial to resolve factual disputes on appeal from a decision by Board).

Whether a worker is permanently totally disabled because of the effects of *both* preexisting physical impairment (otherwise ratable as permanent partial disability) and impairment resulting from a later-occurring industrial injury is a question of fact. *Jussila*, 59 Wn.2d at 778. It was within the province of the jury, therefore, as a trier of fact, to determine whether Lee had any physical or mental condition that was partially disabling to him prior to October 5, 1992. Further, it was within the province of the trier of fact to determine whether such preexisting disability/impairment, combined with impairment from his PSE injury-related condition, caused Lee's permanent and total disability. *See Preston Mill Co. v. Dep't of Labor & Indus.*, 44 Wn.2d 532, 536, 268 P.2d 1017 (1954) (the decision of controverted issues of fact in industrial insurance appeals is by statute lodged in the jury).

2. **Whether Lee had a preexisting permanent impairment of physical capacity to perform job duties which, when combined with impairment from his 1992 PSE injury, proximately caused his permanent total disability was a disputed question of fact about which reasonable minds can differ.**

It is a disputed question of fact whether Lee had any preexisting condition which, when combined with his impairment from the 1992 PSE injury, rendered him permanently disabled. "The test as to whether the case should go to the jury is not on the facts as they would be found to be

by the trial judge or by the judges of this court, but on the issue of whether the evidence introduced at the hearing . . . offers room for a difference of opinion in the minds of reasonable men." *Abbott v. Dep't of Labor & Indus.*, 49 Wn.2d 774, 775-76, 307 P.2d 254 (1956) (citing *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 596, 206 P.2d 787 (1949)); *accord Preston Mill Co.*, 44 Wn.2d at 536 (in compensation cases, "[a] jury question is presented when the evidence before the board is such that the minds of reasonable men may have a difference of opinion upon it, and such a case must be submitted to the jury"); *Alfredson v. Dep't of Labor & Indus.*, 5 Wn.2d 648, 652, 105 P.2d 37 (1940) ("If the evidence introduced at the hearing before the . . . board offers room for a difference of opinion in the minds of reasonable men, then the case must be presented to the jury."); *Sutherland v. Dep't of Labor & Indus.*, 4 Wn. App. 333, 338, 481 P.2d 453 (1971) ("When testimony presents questions on which reasonable men may differ, the matter is for the jury to decide.").

The evidence before the superior court plainly met the standard that reasonable minds may interpret facts differently. This point is no better demonstrated than by the Board's narrow denial of second injury fund relief to PSE by a 2-1 decision. The dissenting Board member took issue with the majority's weighing of the evidence "in this unusual case," dismissing the opinions of the physicians who concluded Lee's permanent

disability was due solely to the 1992 PSE injury. CP at 6. His reason for doing so is sound: Lee had "totally failed to recite his past medical history to either of the physicians." *Id.* The dissenting member also concluded, in contrast to the majority, that Dr. Gritzka had "correctly concluded" Lee's prior neck and back problems were partially disabling and were necessary contributing causes to his eventual permanent disability. The evidence being subject to different interpretations among Board members, it follows that the questions of whether Lee's neck and back problems were partially disabling and whether such preexisting impairments were contributing causes to his eventual permanent disability are disputed factual issues, proper for jury consideration.

**3. PSE presented substantial evidence that Lee's preexisting disabling condition combined with his 1992 injury to render him permanently disabled.**

The record, created at hearing before the Board which was before the superior court, contained substantial evidence, both from Lee and Dr. Gritzka, that (1) Lee objectively manifested preexisting physical impairment/disability, well supported by Lee's own admissions, due to both cervical and lumbar spine conditions from traumatic injury events prior to the 1992 PSE injury. CABR Lee testim. 61:21-62:31, 66:1-13, 67:44-68:26, 69:17-31, 70:5-22, 71:14-31, 74:1-51, 75:1-35, 76:32-49, 81:1-82:17, 82:35-83:38, 108:46-109:10; (2) Lee's preexisting bodily

impairment, i.e., loss of physical function, was ratable under WAC 296-20-240 and WAC 296-20-280, the criteria for permanent *partial* disability awards, and that such impairment did restrict Lee's physical activity, both in workplace and nonworkplace settings. CABR Gritzka dep. 67:12-25, 73:19-75:22, 94:4-11, 95:4-13; (3) but for Lee's preexisting permanent impairments, his October 5, 1992 industrial injury would not have resulted in his becoming permanently totally disabled, *id.* at 86:3-13; and (4) Lee's inability to work is due to the combined effects of impairment proximately caused by his 1992 industrial injury superimposed upon preexisting permanent impairments from causes unrelated to, and unaffected by the 1992 industrial injury. *id.* at 87:10-20.

The evidence presented by PSE was clearly sufficient to take the case to the jury. *See Spalding v. Dep't of Labor & Indus.*, 29 Wn.2d 115, 135, 186 P.2d 76 (1947) (medical witness testimony sufficiently competent to take to jury); *Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 10, 163 P.2d 142 (1945) (same); *cf. Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 96-97, 286 P.2d 1038 (1955) (court properly withdrew the case from the jury where only medical testimony presented by appellant was that of an expert witness who had not examined the decedent, and whose only information concerning him was contained in a defective hypothetical question); *Wilson v. Dep't of Labor & Indus.*, 6 Wn. App.

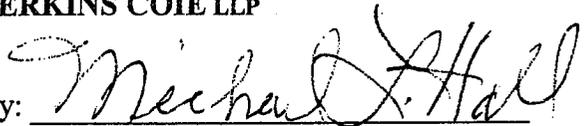
902, 907, 496 P.2d 551 (1972) (testimony of medical expert which, standing alone, was of no more than "scintilla quality" was not substantial evidence and was insufficient to require submission to jury on the issue of permanent total disability).

## VI. CONCLUSION

PSE respectfully asks this Court to reverse the superior court's ruling to strike PSE's jury demand and its ruling embodied in its decision to affirm the Board majority to deny PSE second injury fund relief. This Court should remand this case for a jury trial.

RESPECTFULLY SUBMITTED this 11th day of April, 2008.

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**CERTIFICATE OF SERVICE**

CAROL KNESS states as follows:

1. I am a secretary at the law firm of PERKINS COIE LLP, attorneys of record for Appellant, Puget Sound Energy, Inc., have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. On the 11th day of April, 2008, I made arrangements for the original and one working copy of the foregoing Brief of Appellant to be filed with the Clerk of the above-entitled Court.

3. On the same day, I made arrangements for copies of the same documents to be delivered to counsel for Respondents as follows:

**Hand Delivered**

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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.

SIGNED at Seattle, Washington this 11th day of April, 2008 by  
CAROL KNESS.



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Carol Kness