

ORIGINAL

83433-4

No. 61179-8

FILED LODGED ENTERED RECEIVED

JUL 11 2008 LK

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

PUGET SOUND ENERGY,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF
WASHINGTON and ROBERT R. LEE,

Respondent.

APPELLANT'S REPLY BRIEF

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JUL 11 PM 3:03

Michael L. Hall, WSBA No. 4707
MHall@perkinscoie.com
Vickie L. Wallen, WSBA No. 20872
VWallen@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Appellant
PUGET SOUND ENERGY

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ARGUMENT AND AUTHORITY.....	2
A. Lee Suffered a "Previous Bodily Disability" Under RCW 51.16.120 if His Previous Injuries Permanently Diminished His Capacity to Engage in the Ordinary Pursuits of Life, Including Physical Labor.....	2
B. The Department Is Incorrect that Lee's Impaired Capacity to Fully and Consistently Perform Physical Work Was Not a "Symptomatic" Previous Disability Under RCW 51.16.120	6
1. The Decisions Cited by the Department Show That a Worker's Demonstrated Inability to Fully and Consistently Perform Work Activities Are Essentially "Symptomatic" Impairments Constituting a Previous Disability Under RCW 51.16.120	6
2. The Department Concedes that Lee Could Suffer a "Previous Bodily Disability" Under RCW 51.16.120 Even if His Permanently Diminished Work Capacity Was Unknown to PSE	10
C. The Department Is Incorrect that Lee's Permanently Diminished Work Capacity Must Have Impaired His Ability to Obtain or Maintain Employment Prior to His PSE Injury	13
D. The Department Is Incorrect that Disputed Questions of Fact Did Not Exist as to Whether Lee's Previous Injuries Permanently Diminished His Capacity to Fully and Consistently Perform Physical Labor and Whether Such Limitations Combined with His 1992 Industrial Injury to Proximately Cause His Permanent Total Disability	15
III. CONCLUSION	18

Cases

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992)4

Dolman v. Dep't of Labor & Indus., 105 Wn.2d 560, 716 P.2d 852 (1986)4

Donald W. Lyle v. Dep't of Labor & Indus., 66 Wn.2d 745, 405 P.2d 251 (1965)5

Franks v. Dep't of Labor & Indus., 35 Wn.2d 763, 215 P.2d 416 (1950)12

Henson v. Dep't of Labor & Indus., 15 Wn.2d 384, 130 P.2d 885 (1942)4

In re Alfred Funk, BIIA Dec. No. 89 4156 (Wash. Bd. Ind. Ins. App. Feb. 4, 1991)15

In re Curtis W. Anderson, BIIA Dec. No. 88 4251, 1990 WL 3106245

In re Lance Bartran, BIIA Dec. No. 04 21232 (Wash. Bd. Ind. Ins. App. Nov. 16, 2005)4

In re Leonard Norgren, BIIA Dec. No. 04 18211, 2006 WL 481048, at *6 (Wash. Bd. Ind. Ins. App. Jan. 12, 2006)5, 9

In re Marshall Powell, BIIA Dec. No. 976424 (Wash. Bd. Ind. Ins. App. July 21, 1999)8

In re Sandra McKee, BIIA Dec. No. 04 14107, Mar. 26, 2007 WL 1413127, at *6 (Wash. Bd. Ind. Ins. App. 2007)4

Rothschild Int'l Stevedoring Co. v. Dep't of Labor & Indus., 3 Wn. App. 967, 478 P.2d 759 (1970)5

Sleasman v. City of Lacey, 159 Wn.2d 639, 151 P.3d 990 (2007)4

Statutes

RCW 51.16.120passim

WAC 296-20-24012

WAC 296-20-28012

I. INTRODUCTION

Respondent Department of Labor and Industries (the "Department") does not dispute that, under RCW 51.16.120, a "previous bodily disability" means a preexisting bodily impairment of physical or mental functioning which, to some degree, adversely affects the worker's capacity to fully and consistently perform all work activities. To be entitled to second injury fund relief, appellant Puget Sound Energy, Inc. ("PSE") must establish that Robert Lee manifested such an impairment prior to his 1992 PSE industrial injury which, when combined with impairment resulting from the 1992 injury, caused him to become permanently totally disabled.

The essential conclusion of the superior court that Lee had no preexisting bodily disability is not supported by *any* legal authority cited by the Department. The court's decision is founded on the faulty propositions that PSE had to establish that Lee (1) was impaired in his ability to perform work assignments while working at PSE, (2) had requested or received from PSE an accommodation for a preexisting permanent impairment prior to his 1992 injury, and (3) was limited in his ability to obtain or maintain employment prior to his PSE injury. Under

both statutory and caselaw authorities, none of these propositions is required for PSE to be entitled to second injury fund relief.

Further, the Department is incorrect that there are no material facts in dispute. Whether Lee manifested a diminished capacity to perform work activities prior to his 1992 PSE injury and whether Lee's "previous bodily disability," combined with the permanent effects of his 1992 PSE injury, proximately caused his ultimate permanent total disability are clearly the central factual disputes raised by the evidence presented at hearing before the Board of Industrial Insurance Appeals ("Board"). Determinations on those issues should have been submitted to a jury to weigh and decide.

II. ARGUMENT AND AUTHORITY

A. **Lee Suffered a "Previous Bodily Disability" Under RCW 51.16.120 if His Previous Injuries Permanently Diminished His Capacity to Engage in the Ordinary Pursuits of Life, Including Physical Labor.**

It is undisputed that Washington courts and the Board have consistently and repeatedly interpreted the term "previous bodily disability" under RCW 51.16.120 to mean a preexisting bodily impairment that has permanently diminished a worker's physical or mental ability to fully engage in the ordinary pursuits of life, including the ability to

perform work activities.¹ See, e.g., *Henson v. Dep't of Labor & Indus.*, 15 Wn.2d 384, 386, 130 P.2d 885 (1942) (mineworker who contracted silicosis, which impaired his physical efficiency and "lessened [his] capacity for work," was disabled under the Workers' Compensation Act); *In re Sandra McKee*, BIIA Dec. No. 04 14107, 2007 WL 1413127, at *6 (Wash. Bd. Ind. Ins. App. Mar. 26, 2007) ("To be disabling, a preexisting condition must have had a substantial impact on a worker's functioning. . . [and] have clearly detracted from an individual's ability to engage in the ordinary pursuits of life," including work.); *In re Lance Bartran*, BIIA Dec. No. 04 21232, at 3, 5 (Wash. Bd. Ind. Ins. App. Nov. 16, 2005) (worker's preexisting schizoid personality disorder was previously disabling where the mental illness "affect[ed] the entire person" and "limited [his] ability to obtain and perform the full scope of his

¹ The Department contends that this Court must disregard any Board decisions interpreting RCW 51.16.120 that are inconsistent with the interpretation purportedly argued by the Department in several previous cases to the Board. See Resp't Br. at 27 n.6. This contention is wholly without merit. See *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007) (an "agency must show it adopted its interpretation as a 'matter of agency policy.' While the construction does not have to be memorialized as a formal rule, it cannot merely 'bootstrap a legal argument into the place of agency interpretation,' but must prove an established practice of enforcement.") (citations omitted); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992) ("If an agency is asserting that its interpretation of an ambiguous statute is entitled to great weight it is incumbent on that agency to show that it has adopted and applied such interpretation as a matter of agency policy."); accord *Dolman v. Dep't of Labor & Indus.*, 105 Wn.2d 560, 566, 716 P.2d 852 (1986) (administrative interpretation of statute, as demonstrated by established administrative practice, is an aid to judicial interpretation). The Department admits that it has never adopted a rule or policy statement regarding the interpretation of RCW 51.16.120 and also fails to cite to any record evidence demonstrating an established administrative practice in regards to its statutory interpretation.

employment potential"); *In re Curtis W. Anderson*, BIIA Dec. No. 88 4251, 1990 WL 310624, at *2 ("previous bodily disability" means the impairment has had a deleterious "effect upon an individual's performance of his employment"); *cf. Donald W. Lyle v. Dep't of Labor & Indus.*, 66 Wn.2d 745, 748, 405 P.2d 251 (1965) (a "previous disability" did not include a worker's "latent, or quiescent" arthritic condition that had not become manifest as a physical impairment); *Rothschild Int'l Stevedoring Co. v. Dep't of Labor & Indus.*, 3 Wn. App. 967, 969-70, 478 P.2d 759 (1970) (worker's temporarily disabling injuries did not qualify as a "previous bodily disability" as a matter of law where the worker was "doing 'everything' required of a longshoreman" throughout his 21-year career); *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" that limited his ability to perform work) (internal quotation marks and citation omitted).

Here, Lee testified that several injury events prior to his PSE employment substantially diminished his subsequent capacity to fully and consistently perform various work activities as a lineman. These included restrictions on heavy lifting and limitations on his ability to reach and

perform work overhead. CABR Lee Test. at 61:44-62:5, 82:49-83:30. He admitted that his reduced capacity to fully and consistently perform such physical labor during the nearly 10-year period preceding his employment with PSE had led him (1) to rely on prescription medication for pain relief from the effects of prior injuries, (2) to secure ongoing medical treatment, (3) to seek less strenuous lineman jobs than he had performed before those injury events, such as a "non-working foreman" and "crew lead," as well as (4) to rely on the assistance of coworkers to perform physical job tasks that he could not perform. *Id.* at 61:21-35, 62:8-30, 65:39-44, 66:14-42, 81:1-82:15, 82:23-33.

Where, as here, Lee admitted that he was incapable of fully and consistently performing physical work activities over a nearly 10-year period in a host of pre-PSE employments, it is reversible error for the superior court to conclude, as a matter of law, that Lee had no "previous bodily disability" as contemplated under RCW 51.16.120.

B. The Department Is Incorrect that Lee's Impaired Capacity to Fully and Consistently Perform Physical Work Was Not a "Symptomatic" Previous Disability Under RCW 51.16.120.

1. The Decisions Cited by the Department Show That a Worker's Demonstrated Inability to Fully and Consistently Perform Work Activities Are Essentially "Symptomatic" Impairments Constituting a Previous Disability Under RCW 51.16.120.

The legal authority cited by the Department fails to support the superior court's conclusion that Lee's admitted and demonstrated inability to fully and consistently perform activities over a nearly 10-year period was not a "symptomatic" previous disability under RCW 51.16.120. PSE contends that the nature of a symptomatic condition encompasses far more than just subjective perceptions. In the context of this case, it included a decrease in strength and limitations of motion, both of which Lee admitted restricted his working career before commencing employment with PSE. Whether such incapacity was apparent while he was working for PSE is irrelevant when, in fact, Lee admitted to performing at a diminished capacity as a result of prior injuries to his neck, shoulders, and low back that restricted him in work activities that he had previously performed. This diminished capacity was not a mere latent or quiescent temporary condition according to Lee's sworn testimony. CABR Lee Test. at 61:21-35, 61:44-62:5, 62:8-30, 65:39-44, 66:14-42, 81:1-82:15, 82:23-33, 82:49-83:30.

Contrary to the Department's assertions, the legal authorities cited uniformly stand for the proposition that a preexisting impairment that detracts from a worker's capacity to fully and consistently perform normal daily activities, including work activities, *is by definition* a "symptomatic," "known," "manifest," or "active," disability under RCW 51.16.120. *See In re McKee*, 2007 WL 1413127, at *6 (worker's disabling mental health condition, which "adversely affected her ability to do well in school, have successful marriages, and limited her employment options in the competitive labor market" was "manifest" prior to her developing occupational asthma.); *In re Bartran*, at *5 (worker's personality disorder was "symptomatic and disabling" where it had limited his ability to perform his full employment potential); *In re Marshall Powell*, BIIA Dec. No. 976424 at *8-9 (Wash. Bd. Ind. Ins. App. July 21, 1999) (worker who had been an "insulin dependent diabetic for several years" and whose disease had "substantially and negatively impacted [his] daily functioning and efficiency," had "active" diabetes, a "previous bodily disability" under RCW 51.16.120.).

The evidence in Lee's case differs demonstrably from cases where Washington courts and the Board have found insufficient evidence of a preexisting impairment that substantially affected an individual's capacity to fully and consistently engage in work activities. *See Lyle*, 66 Wn.2d at

746 (where the record did not indicate that an injured worker's capacity to work was in any way diminished by his preexisting disease of degenerative arthritis, the disease was deemed to be "latent, or quiescent, and not disabling"); *Rothschild Int'l Stevedoring Co.*, 3 Wn. App. at 969-70 (worker throughout his career "was doing 'everything' required of a longshoreman;" [his] traumatic neurosis" was a "latent threat because of his age, general frailty, and general physical condition – a non-disabling 'infirmary'"); *In re Norgren*, 2006 WL 481048 at *6-7 (worker who sustained previous temporarily disabling injuries and medical conditions that did not impair his ability to work "in any way" did not have a "previous bodily disability" entitling employer to second injury fund relief); *In re Anderson*, 1990 WL 310624 at *2 (second injury fund relief was not appropriate where there was no evidence that the worker's preexisting injuries and conditions "had been other than temporarily disabling. Up to the time of his final disabling injury . . . [the worker] was doing 'everything' required of a [timber faller]. . . . [He] was fully able to perform his . . . duties as a logger.").

Taken together, the cases cited by the Department demonstrate that a preexisting impairment that *has* diminished a worker's capacity to fully and consistently perform work activities over time is undeniably *symptomatic*. Despite the Department's contention to the contrary, these

cases do *not* hold that a worker lacks a symptomatic disability unless he evidences specific symptoms or restrictions in the course of performing particular job duties for a subsequent employer where a "second" injury occurs.

Rather, these cases hold that a worker does not have a symptomatic disability where he has demonstrated the ability to *fully perform all work activities with all employers over time*. That is not the circumstance presented in the record in PSE's appeal. Evidence presented by PSE in this case clearly raises the question of whether Lee was effectively limited in the ability to perform the type of work activities he had fully performed for other employers before both industrial and non-industrial injuries to his neck and lower back, dating from 14 years prior to his PSE employment.

Although the testimony record in this case does not compare the specific duties of Lee's job at PSE with those of his previous jobs, it is clear that, prior to his employment, Lee's physical impairments from prior injuries caused him to seek lighter work and/or rely on the assistance of his coworkers to cover for his physical incapacity. Whether Lee's permanent total disability was due to such combined effects is a question of fact that should have been presented to a jury.² The possibility that

² PSE sought to present rebuttal testimony of a vocational consultant, (CP 396-97) but the hearings judge denied PSE that opportunity at the conclusion of the Department's case. *Id.* at 398-99. Such testimony would have proven that much of Lee's prior employment

Lee's disabling impairments from prior injuries may not have unduly impaired him from performing his assigned PSE duties does not mean that Lee did not manifest *previous* permanent bodily disabilities that became more disabling when the ultimate effects of his 1992 PSE injury were added in, causing him to become permanently totally disabled. The superior court erred in holding otherwise.

2. The Department Concedes that Lee Could Suffer a "Previous Bodily Disability" Under RCW 51.16.120 Even if His Permanently Diminished Work Capacity Was Unknown to PSE.

The Department concedes that RCW 51.16.120 does not require PSE to have had knowledge of Lee's preexisting disability to be entitled to second injury fund relief. *See* Resp't Br. at 39 (admitting that the "plain language" of RCW 51.16.120 provides that an employer need not have knowledge of a worker's preexisting disability); *accord* Appl't Br. at 23-26.

The Department disputes, however, that the superior court *effectively* incorporated an improper employer-knowledge requirement when it concluded that Lee did not suffer a "previous bodily disability" under RCW 51.16.120 because his disabling injuries were not "symptomatic" at the time he worked for PSE and did not require an

required greater physical capacity — which he was unable to perform without assistance from coworkers — than did his job duties at PSE.

accommodation. The Department contends that the superior court's conclusions were simply determinations of PSE's failure to produce evidence of a preexisting permanent disability. *See* Resp't Br. at 39. The record of evidence presented to the court patently raises questions of fact surrounding the court's determination of those questions.

The record testimony did, in fact, contain substantial evidence that Lee had a preexisting permanent disability. Lee plainly admitted that his pre-PSE injuries subsequently and substantially diminished his capacity to fully and consistently perform various physical work activities with prior employers. *See* CABR Lee Test. at 61:44-62:5, 82:49-83:30. Dr. Gritzka clearly established that Lee's pre-PSE injuries to his neck and lower back directly caused what would be classified as Category 2 permanent impairments under WAC 296-20-240 and WAC 296-20-280. *See* CABR Gritzka Dep. at 67:12-25. Such impairments are based on a loss of physical functioning capacity, but are also predicated upon a commensurate loss of earning power. *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 774-75, 215 P.2d 416 (1950).

Whether Lee's specific job duties at PSE were lighter than or otherwise different from those of his previous jobs, so as to not appear to have a diminished physical capacity or a need for accommodation, is not revealed by the record testimony. First, because the legal foundation for

second injury fund relief does not require it, and, second, because PSE was denied the opportunity to present rebuttal testimony from a vocational consultant that would have addressed those issues. *See supra*, at n.2.

Notwithstanding this evidence, the superior court concluded that Lee was not "previously bodily disabled" *as a matter of law* because his diminished physical capacity was neither "symptomatic" nor in need of an accommodation *at PSE* prior to his 1992 injury. The superior court's conclusion requires, in effect, that Lee's preexisting disability be *visible* and *known* to PSE before second injury fund relief can be granted. As discussed more fully in Appellant's Opening Brief, such an interpretation of RCW 51.16.120 is directly contrary both to the statute's express language and well-established objectives, which include encouraging the employment of partially disabled workers. *See Appl't Br.* at 23-26. Further, by requiring PSE to discover Lee's preexisting impairments, the superior court fundamentally created a duty inconsistent with equal employment opportunity statutes, such as the Americans with Disabilities Act and the Washington Law Against Discrimination. Under both statutes, employers are precluded from pre-employment inquiries about a worker's prior injuries or disabilities.

The superior court erred when it concluded that Lee was not "previously bodily disabled" under RCW 51.16.120 because his

diminished physical capacity was neither "symptomatic" nor in need of an accommodation at PSE prior to his 1992 injury. The court's conclusions are not supported by well-established Washington precedent in which a worker's diminished capacity to consistently and fully perform physical work activities is deemed to constitute a "symptomatic" disability. In addition, the court's conclusions effectively incorporate an employer-knowledge requirement that is squarely contrary to the language and intent of the statute.

C. The Department Is Incorrect that Lee's Permanently Diminished Work Capacity Must Have Impaired His Ability to Obtain or Maintain Employment Prior to His PSE Injury.

The Washington court and Board decisions relied on by the Department do not support the superior court's conclusion that RCW 51.16.120 alternatively requires showing that Lee's diminished capacity to perform physical labor impaired his ability to obtain or maintain employment prior to his industrial injury at PSE. Rather, the cases cited by the Department simply reiterate the fact that a worker who has had a prior injury but who, nevertheless, retained the capacity to fully and consistently perform all ordinary life activities, including unrestricted work activity, does not have a "previous bodily disability" for purpose of second injury fund relief. That, however, is not the case with Robert Lee.

For example, in *Rothschild*, the court of appeals held that a previous disability did not exist where the worker's *temporarily* disabling injuries did not prevent him from "doing 'everything' required of a longshoreman" throughout his 21-year career up until the time of his ultimate injury. 3 Wn. App. at 969-70 (emphasis added). Robert Lee's limitations from prior injuries were not mere temporary infirmities.

In *In re Alfred Funk*, BIIA Dec. No. 89 4156 (Wash. Bd. Ind. Ins. App. Feb. 4, 1991), the Board determined that no previous disability existed where a worker testified that his congenital heart condition and degenerative arthritis "*never interfered*" with his ability to perform work in his lifelong occupation of logging and were not conditions for which he ever received treatment. *Funk*, at *6-7 (despite numerous industrial injuries and a congenital heart condition, the worker continued to work as a logger "*apparently without limitation*") (emphases added). Lee's impairments did restrict the types of work he was able to perform.

In *In re Curtis W. Anderson*, the Board concluded that a worker's preexisting conditions were not previously disabling because he had been "*fully able* to perform his demanding job duties as a logger" for approximately 36 years. 1990 WL 310624, at *2 (emphasis added). To the contrary in this case, Lee admitted reliance on coworkers to carry his load.

These cases confirm that it is a worker's *capacity* to fully and consistently perform work activities that is dispositive of whether a preexisting disability exists to bring the second injury fund relief statute into play. Second injury fund relief is appropriate even though a preexisting impairment did not preclude full capacity in some employments, but did limit one's vocational alternatives. *Accord In re McKee*, 2007 WL 1413127, at *2, 3 (employer was entitled to second injury fund relief even though the worker's preexisting mental health and learning impairments "did not prevent her from working" "without restrictions" because they limited her vocational options); *In re Bartran*, at *3, 5 (employer was entitled to second injury fund relief even though injured worker's preexisting schizoid personality disorder did not preclude him "from reasonably continuous employment," because the impairment "precluded him from having transferable job skills").

D. The Department Is Incorrect that Disputed Questions of Fact Did Not Exist as to Whether Lee's Previous Injuries Permanently Diminished His Capacity to Fully and Consistently Perform Physical Labor and Whether Such Limitations Combined with His 1992 Industrial Injury to Proximately Cause His Permanent Total Disability.

Disputed questions of fact plainly exist and center on whether Lee's pre-PSE injury events resulted in permanently diminishing his capacity to fully perform physical work. During the approximately

14-year period preceding Lee's PSE injury, Lee admitted that his previous injuries prevented him from fully and consistently performing various physical activities, including heavy lifting and reaching above his head. CABR Lee Test. at 61:44-62:5, 82:49-83:30. For over a decade, Lee testified, these ongoing physical restrictions led him (1) to seek ongoing medical treatment, (2) to rely on prescriptive medication for pain relief from the effects of prior injuries, (3) to seek employment with lighter work assignments, for example, as a "non-working foreman," as well as (4) to rely on the assistance of coworkers to perform physical job tasks that he could not perform. *Id.* at 61:21-35, 62:8-30, 65:39-44, 66:14-42, 81:1-82:15, 82:22-33.

Dr. Gritzka testified, in addition, that Lee's injuries had caused a permanent neck and lower back impairment, each ratable as a Category 2 permanent partial disabilities. CABR Gritzka Dep. at 67:12-25.

Although Lee was not fully precluded from performing employment activities prior to his 1992 PSE injury, Dr. Gritzka's testimony supports that Lee had a permanent preexisting impairment that detracted from his physical capacity to perform work. *Id.* at 90:3-19, 100:11-101:1. The Department, on the other hand, asserts that Lee's previous injuries and restrictions were insubstantial and temporary. *See* Resp't Br. at 31-32 ("Lee's testimony does not permit the inferences of permanency of

symptoms and limitations that PSE wants the Court to draw."). PSE submits that the weighing of such evidence is at the core of the jury's role.

A dispute of fact exists whether Lee was able to fully perform physical labor while he was working at PSE. While Lee's testimony suggests that he may have been able to perform the physical tasks of his particular job duties at PSE, the record evidence does not indicate whether the specific tasks assigned to Lee required the same degree of heavy lifting, overhead reaching, or other physical demands that were required in his previous jobs. Moreover, PSE's attempt to introduce rebuttal evidence addressing this question was wrongly denied by the hearings judge and the Board. CP 398-99.

A dispute of fact also exists whether Lee's preexisting disability when combined with the effects of his 1992 PSE injury proximately caused his permanent total disability. Dr. Gritzka testified that but for the combined effects of preexisting impairment superimposed upon impairment from the 1992 injury, Lee would not have become permanently disabled. CABR Gritzka Dep. at 87:10-24. PSE contends that the evidence presented to the Board met the legal requirements for second injury fund relief. PSE submits that it should have the right to ask a jury to weigh and evaluate such evidence in the face of the deficient knowledge of Dr. Stoney and Dr. Dobkin, who both admitted to being

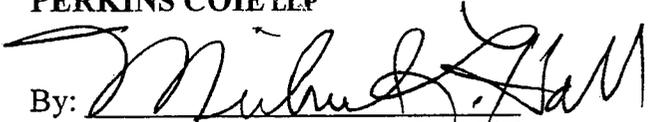
wholly unaware of Lee's prior injuries. PSE contends that a jury could find, as did Calhoun Dickinson, the dissenting member of the Board, that Dr. Stoney and Dr. Dobkin's analysis was flawed as it was based on inaccurate and incomplete history and upon incorrect assumptions of fact. *See* Appl't Br. at 12 n.2. The weight that should be given to such opinions is a question for a jury as the trier of fact. It was error for the superior court to circumvent that process.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the superior court's conclusion that Lee did not, as a matter of law, suffer a "previous bodily disability" under RCW 51.16.120. The case should be remanded to permit PSE to have a jury review the material questions of fact underlying a determination for second injury fund relief. Alternatively, this Court could direct that the case be remanded to the superior court to, in turn, remand the case to the Board to permit the vocational testimony that PSE sought to present in rebuttal at the conclusion of the Department's case.

RESPECTFULLY SUBMITTED this 11th day of July, 2008.

PERKINS COIE LLP

By: 

Michael L. Hall, WSBA No. 4707

MHall@perkinscoie.com

Vickie L. Wallen, WSBA No. 20872

VWallen@perkinscoie.com

1201 Third Avenue, Suite 4800

Seattle, WA 98101-3099

Telephone: 206.359.8000

Facsimile: 206.359.9000

Attorneys for Appellant

PUGET SOUND ENERGY

CERTIFICATE OF SERVICE

CAROL KNESS hereby states:

1. I am a secretary to Michael L. Hall at the law firm of Perkins Coie LLP, have personal knowledge of the facts set forth below and am competent to testify thereto.
2. On the 11th day of February, 2008, I made arrangements for true and correct copies of the foregoing Appellant's Reply Brief to be hand delivered to:

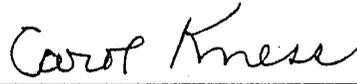
Marta S. Lowy
Office of Attorney General
800 Fifth Ave., #2000
Seattle, WA 98104-3188
Attorneys for Department of Labor
& Industries

David L. Harpold
8407 S. 259th St., #101
Kent, WA 98030-7536
Attorney for Claimant Robert R. Lee

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JUL 17 PM 3:04

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the State of Washington that the foregoing is true and correct.

SIGNED and DATED at Seattle, Washington this 11th day of July, 2008 by CAROL KNESS.



Carol Kness