

NO. 67209-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STEVEN J. STONE, Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.

REPLY BRIEF OF APPELLANT

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II. ARGUMENT

A. *De Novo* Standard of Review

Mr. Stone appealed from the trial court's May 16, 2011 decision, which affirmed the Board's decision that he cannot receive a permanent partial disability (PPD) award in his previous claim for his prior right knee industrial injury absent proof that he was totally permanently disabled solely because of his subsequent low back industrial injury. Mr. Stone's entitlement to PPD necessarily turns on this Court's interpretation of RCW 51.32.060 and 51.32.080.

Appellate courts review questions of statutory interpretation *de novo*. *Clauson v. Dept. of Labor and Indus.*, 130 Wn.2d 580, 626, 925 P.2d 624 (1996); *Tomlinson v. Puget Sound Freight Lines, Inc.*, 140 Wn. App. 845, 850, 166 P.3d 1276 (2007). The appellate courts -- not administrative agencies -- have the ultimate authority to interpret statutes. *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994); *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325-326, 646 P.2d 113 (1982), *cert. denied*, 459 US 116 (1983). Whether an agency's construction of a statute is accorded deference depends on whether

the statute is ambiguous. True, as the Department points out, when an agency is charged with the administration and enforcement of a statute, the agency's interpretation of an *ambiguous* statute may be given great weight. Respondent Brief (RB) 11-12; *Pasco v. Public Empl. Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992) (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813-14, 828 P.2d 529 (1992)). However, when the statute is not ambiguous, courts need not defer to an agency's expertise to construe the statute. *Pasco v. Public Empl. Relations Comm'n*, 119 Wn.2d at 509. And in no instance is deference given to an agency determination when it conflicts with the statute. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d at 815.

Equally important to this Court's analysis, the findings and decision of the Board of Industrial Insurance Appeals (Board) shall not be deemed *prima facie* correct. *Puget Sound Bridge Dredging Co. v. Dept. of Labor and Indus.*, 26 Wn.2d 550, 555, 174 P.2d 957 (1946). Indeed, appellate courts have cautioned trial courts against deferring to agency interpretation of a statute. *Cockle v. Dept. of Labor and Indus.*, 142 Wn.2d 801, 813, 16 P.3d 583 (2001); see also *Johnson v.*

Weyerhaeuser, 84 Wn.App 713, 718, 930 P.2d 331 (1997), *reversed on other grounds*, 134 Wn.2d 795, 953 P.2d 800 (1998).

When considering this appeal, the Industrial Insurance Act's fundamental purpose must be kept in mind -- to provide sure and certain benefits to injured workers and, to that end, the provisions of the Act are to be **liberally construed in the worker's favor**:

The 1971 Legislature also codified a principle already long recognized by our courts: 'This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment'. RCW 51.12.010. In other words where reasonable minds can differ over what Title 51 RCW provisions mean, the benefit of the doubt belongs to the injured worker. 'The guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.'

Cockle v. Dept. of Labor and Indus., 142 Wn.3d 801, 811 (2001) *quoting Dennis v. Dept. of Labor and Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987) and *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727 (1997).

B. Mr. Stone Does Not Contend He Is Entitled to PPD and Pension Benefits for the Same Injury.

The Department fairly sets forth the law that an injured worker cannot at the same time receive a PPD award *and* total permanent disability benefits for the same industrial injury. RB 13; *Harrington v. Dept. of Labor and Indus.*, 9 Wn.2d 1, 5, 113 P.2d 518 (1941). This is because a worker cannot be both partially disabled and, at the same time, totally disabled by the same injury.

The Department also fairly explains that a worker who is permanently incapable of gainful employment as a proximate result of an industrial injury is not partially disabled but rather totally disabled and, as such, qualifies for pension benefits. RB 13-14; RCW 51.08.160. In contrast, a worker who has suffered permanent impairment as a proximate result of an industrial injury but is capable of gainful employment is not totally disabled but rather only partially disabled and, as such, qualifies for an award of PPD for his or her permanent impairment. RB 14; RCW 51.08.150; 51.32.080.

However, the Department then asserts it “determined that Stone was permanently and totally disabled as a proximate result of the combined effects of his knee injury and his back injury”, that

“neither injury, standing alone, was sufficient to cause him to be permanently and totally disabled”, and consequently he cannot receive a PPD award for either injury. RB 16. This strained conclusion is not supported by law.

The controlling statute for Mr. Stone’s entitlement to an award of PPD for his knee impairment is RCW 51.32.060(4), which clearly provides,

(4) Should any further accident result in the permanent total disability of an injured worker, he or she shall receive the pension to which he or she would be entitled, **notwithstanding the payment of a lump sum for his or her prior injury.**

RCW 51.32.060(4) (emphasis added).

The statute is unambiguous. Consequently, deference should not be granted to the Board’s or Department’s interpretation of the statute. Indeed, these agencies’ interpretation – that a worker cannot receive a pension in a subsequent claim in addition to PPD for a previous injury -- is in direct conflict with the statute. RCW 51.32.060(4) clearly permits a worker to receive *both* pension benefits in a current claim in addition to an award of PPD for a prior industrial injury in a previous claim and the statute does not impose the

condition that the “further accident” be the sole cause of the worker’s total permanent disability. Indeed, when evaluating a worker’s ability to work and whether he or she is totally permanently disabled, the law requires the Department to consider not only the industrial injury but also all pre-existing disabilities and infirmities regardless of whether or not the pre-existing disabilities are from prior industrial injuries. *Wendt v. Dept. of Labor and Indus.*, 18 Wn. App. 674, 571 P.2d 229 (1977); *Fochtman v. Dept. of Labor and Indus.*, 7 Wn. App. 286, 499 P.2d 255 (1972).

The Department suggests that, because Mr. Stone is totally permanently disabled by the “combined effects” of his back injury and pre-existing knee disability, his permanent partial (not total) knee disability became indistinguishable from his total permanent disability and therefore not commensurate with a PPD award:

Since it is a verity on appeal that both Stone’s knee injury and his back injury proximately caused him to be permanently and totally disabled, and since a worker cannot be totally disabled and partially disabled at the same time as a proximate result of the same injury, it follows that neither Stone’s knee injury nor his back injury was a proximate cause of permanent partial disability. As his knee injury was not a proximate cause of permanent partial impairment as a matter of law, he is not eligible for such an award.

RB 17.

This is akin to contending Mr. Stone is not entitled to a PPD award for his knee impairment caused by the previous industrial injury under his prior claim because his low back and knee conditions have coalesced into a single injury. This is legally and factually impossible. Nothing in the Act permits the Department to combine two separate industrial injuries into a single injury. Moreover, Mr. Stone does not assert he is totally disabled and partially disabled at the same time as a proximate result of the same injury. The medical evidence in the record supports he had two distinct industrial injuries which occurred years apart and to different body parts. His previous and entirely separate knee injury had reached maximum medical improvement, resulted in permanent impairment, and was deemed only partially disabling two years prior to the adjudication of his total permanent disability under his low back claim. Had his low back injury never have occurred, Mr. Stone would have been capable of gainful employment and his claim closed with an award of PPD for his permanent right knee impairment. As such, his permanent partial knee disability is distinct and can be adjudicated entirely separate

from his low back claim and there is no legal authority to support the Department's position that it can turn two separate injuries, occurring at separate times resulting in separate claims, into a single industrial injury for the purpose of eliminating PPD liability. The only reason the Department can make this argument is because it failed to respond to Mr. Stone's request for PPD in his previous right knee claim in a timely manner and instead delayed adjudication of the right knee claim for over a year until it was finally able to resolve his low back claim. The Department should not be permitted to profit from delinquent claims management tactics at the expense of the injured worker.

C. The Board Decisions Cited by the Department Are Distinguishable from Mr. Stone's Case.

The Department relies upon Board decisions, *In re: Joanne D. Lusk*, BIIA Dec., 89 2984, 1991 WA Wrk. Comp. LEXIS 60, *In re: Eddy V. Maupin*, BIIA Dec., 04 14768, 2005 WA Wrk. Comp. LEXIS 246, and *In re: Earl M. Hollingsworth*, BIIA Dckt. 96 6818, 96 6819, 96 6820, 1998 WA Wrk. Comp. LEXIS 205, to support its statutory interpretation. However, these agency decisions are not controlling and are entitled to any deference because RCW 51.32.060 is

unambiguous and they are in direct conflict with the statute. Even if they were not, the cited Board decisions are distinguishable from Mr. Stone's case.

In *Joanne Lusk*, the Board itself noted two factors that distinguish it from *In re: Roy T. Sulgrove*, BIIA Dec. 88 0869, 1989 WA Wrk. Comp. LEXIS 22, which Significant Board decision is more applicable to Mr. Stone's claim:

First, in *Sulgrove* the Department did not consider the disability in both claims when classifying Mr. Sulgrove as a permanently totally disabled worker. In Mrs. Lusk's case the Department considered the disability associated with Claim Nos. H-268570 and J-344117 and determined that they both produced the permanent total disability. Second, in *Sulgrove*, the Department failed to act on the claimant's request for a permanent partial disability award until after putting Mr. Sulgrove on the pension rolls in a different claim. The Department has not failed to respond to such a request in Mrs. Lusk's case. The Department appropriately considered the disability associated with both claims and determined that when combined they produced permanent total disability.

Joanne D. Lusk, BIIA Dec., 89 2984, 1991 WA Wrk. Comp. LEXIS 60 at 2. It is unclear in *Lusk* when the claimant's previous industrial injury had reached maximum medical improvement and whether she was fully capable of gainful employment when considering only the

prior injury. Nevertheless, what is clear in *Sulgrove* is the Board's emphasis on the Department's delayed adjudication of PPD benefits, i.e., that the claimant had expressly asked the Department to close his prior claim with PPD and the Department failed to respond. This was evidently not the case in *Lusk* and yet it is precisely what transpired in Mr. Stone's case.

In Mr. Stone's case, his knee condition had become medically stable two years prior to the Department's adjudication of his low back claim, he was deemed employable in the knee claim when the Department transferred the entirety of his time loss payments to his subsequent low back claim, and he requested a PPD award for his permanent knee impairment, yet the Department failed to act on Mr. Stone's request until it adjudicated his low back claim, at which time instead of awarding PPD, it consolidated his previous knee claim into his later low back claim. As the Board in *Sulgrove* underscored,

The mere passage of time and administrative delay should not operate to deprive Mr. Sulgrove of his potential entitlement to a permanent partial disability award for his asbestosis, if he was in fact permanently partially disabled prior to September 4, 1987 [the date the worker was adjudicated totally and permanently disabled]. That is, if Mr. Sulgrove was entitled to a permanent partial disability under Claim No. J-719185 prior to September 4, 1987, which the Department

failed to promptly pay, the Department cannot be relieved of that obligation solely because Mr. Sulgrove is now on the pension rolls under Claim No. H-731884.

In re: Roy T. Sulgrove, BIIA Dec. 88 0869, 1989 WA Wrk. Comp.

LEXIS 22 at 2.

Incidentally, *Lusk* is further distinguishable from Mr. Stone's case in that the entire pension reserve in *Lusk* was charged against the second injury fund whereas in Mr. Stone's case, only a portion was charged, corroborating the fact his knee disability was only partial as opposed to total. *CABR 82, 83, 84*.

Similar to *Lusk*, it is unclear in *Maupin* when the claimant's prior industrial injury had reached maximum medical improvement, whether any evidence was presented as to his employability when considering only the previous injury, and whether all matters had been resolved – for instance, for a period of years as in Mr. Stone's case – well before the Department's adjudication of the pension in the subsequent claim. In stark contrast to Mr. Stone's case, Mr. Maupin evidently received time loss under the *prior* claim up until the date the pension was awarded. In Mr. Stone's case, the evidence is uncontroverted that his right knee injury had reached maximum

medical improvement and did not preclude him from full-time employment and his time loss ended in his prior right knee claim two years prior to the Department's adjudication of his low back claim.

In the only other Board decision upon which the Department's case relies, *Hollingsworth*, the Board expressed concern that the Department could not determine the claimant's capacity for gainful employment when considering only the prior injury because of his ongoing need for medical treatment including for the prior injury:

[I]t is clear from the record in this appeal that the nature of Mr. Hollingsworth's three industrial injuries were such that the Department could not administer benefits under the three claims separately and independent of each other. Mr. Hollingsworth's conditions were sufficiently disabling and overlapping that they required simultaneous temporary total disability payments of his June 1986 and May 1990 injuries.

In re: Earl M. Hollingsworth, BIIA Dckt. 96 6818, 96 6819, 96 6820, 1998 WA Wrk. Comp. LEXIS 205 at 2.

In Mr. Stone's case, his previous right knee injury had reached medical stability two years prior to the pension decision in his low back claim, his right knee impairment had been established also well before the pension determination relative to his low back injury, and,

in light of the decision to transfer his time loss payments to his back claim, his right knee condition was determined to not preclude him from full-time employment. The Department could easily and, in fact, did administer Mr. Stone's benefits including time loss under the low back claim fully independent of the previous right knee injury claim. This is not a situation like the Department faced in *Hollingsworth* where Mr. Stone's conditions "were sufficiently disabling and overlapping that they required simultaneous temporary total disability payments" under both injuries until final resolution of both claims.

In summary, when carefully considering the facts in *Lusk*, *Maupin*, and *Hollingsworth*, it becomes clear the Department's reliance on these decisions for its case is misplaced. Each case is distinguishable from Mr. Stone's, especially on the material facts: the complete resolution of all matters including treatment and employability in the prior claim well in advance of the same matters in the subsequent claim, the Department's failure to act on the claimant's reasonable request to close the prior claim with PPD, and the Department's ability to continue adjudication of the subsequent claim completely independent of the previous claim.

Moreover, even if these Board decisions were not distinguishable, the agency's position clearly conflicts with RCW 51.32.060 and, when an agency's decision conflicts with the statute, its interpretation is entitled to no deference. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d at 815.

D. The Appellate Court Decisions Support Mr. Stone, Not the Department.

Notwithstanding the two relevant appellate court decisions, *Clauson v. Dept. of Labor and Indus.*, 130 Wn.2d 580, 925 P.2d 624 (1996), and *McIndoe v. Dept. of Labor and Indus.*, 144 Wn.2d 252, 26 P.3d 903 (2001), support a worker's entitlement to an award of PPD for previous injuries as well as pension benefits in subsequent claims, the Department asserts they stand for the opposite, that a worker cannot lawfully receive both an award of PPD and pension benefits for separate industrial injuries unless the prior injury that resulted in only *partial* disability is entirely unrelated to the subsequent disability caused by the second injury. However, the Department erroneously equates injury with disability. The Department argues Mr. Stone's subsequent total *disability* must be entirely unrelated to the previous injury and solely due to his subsequent low back injury. RB 10. Later,

the Department asserts Mr. Stone's right knee was "originally classified" as producing only partial disability and then later "reclassified" his knee injury and low back injury "as a combined effects pension." Once again, the Department attempts to consolidate Mr. Stone's right knee and low back conditions into a single injury in order to invoke the prohibition of a worker receiving at the same time both a PPD award and pension benefits for the same injury. Nowhere in the Act or appellate case law is the Department granted the authority to "reclassify" conditions or disabilities into a single injury. Mr. Stone's separate and distinct industrial injuries must be adjudicated separately in terms of his entitlement to an award of PPD for his prior right knee impairment in his previous workers' compensation claim and pension in his low back claim.

E. The Amendment to RCW 51.32.080 Does Not Apply to Mr. Stone's Case and the Fact the Legislation Changed Supports His Entitlement.

The Department cites the legislature's amendment in 2011 of RCW 51.32.080 to support its position that Mr. Stone cannot lawfully receive a PPD award for his prior right knee injury in his previous claim and pension benefits under his low back claim.

In 2011, RCW 51.32.080(4) was amended as follows:

If permanent partial disability compensation is followed by permanent total disability compensation, ~~((any portion of the permanent partial disability compensation which exceeds the amount that would have been paid the injured worker if permanent total disability compensation had been paid in the first instance))~~ all permanent partial disability compensation paid to the worker under the claim or claims for which total permanent disability compensation is provided shall be, at the choosing of the injured worker, either (a) Deducted from the worker's monthly pension benefits ((in an amount not to exceed twenty five percent of the monthly amount due from the department or self insurer or one sixth of the total overpayment, whichever is less)) until the total award or awards paid are recovered; or (b) deducted from the pension reserve of such injured worker and his or her monthly compensation payments shall be reduced accordingly. Any interest paid on any permanent partial disability compensation may not be deducted from the pension benefits or pension reserve. The provisions of this subsection apply to all permanent total disability determinations issued on or after July 1, 2011.

Laws of 2011, ch. 37, § 401.

First, the statute as amended is expressly limited to “permanent total disability determinations issued on or after July 1, 2011” and clearly was not intended as a tool to recover scores of PPD awards paid to workers in prior claims who years, even decades, later receive pensions for subsequent injuries. Needless to say, adoption

of this flawed analysis would augment countless worker' financial troubles rather than reduce "to a minimum the suffering and economic loss arising from injuries . . ." RCW 51.12.010.

Furthermore, the fact that the legislature amended RCW 51.32.080 to permit the Department, only beginning July 1, 2011, to recoup previous PPD under any of the claims in which the Department later awards a pension merely evidences the Department's attempt to check injured workers' entitlements in lean financial times in light of the unambiguous provisions in RCW 51.32.060 permitting a worker to receive pension benefits notwithstanding his or her entitlement to a PPD award for a prior industrial injury in a previous claim. The Department argues the statute was amended to clarify a previous ambiguity. RB 40-41. However, when the former version of RCW 51.32.080(4) is read together with RCW 51.32.060, there is no ambiguity. Since Mr. Stone's pension was awarded prior to the July 1, 2011 effective date of the amended statute and RCW 51.32.060 unambiguously allows for a worker to receive both PPD and pension as long as they are for separate, unrelated injuries, the amendment does not apply and Mr.

Stone is entitled to both benefits for his separate and distinct industrial injuries.

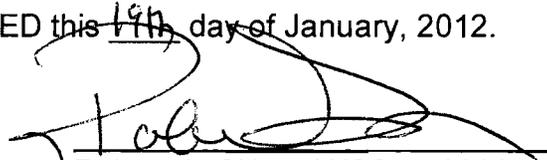
The Department concludes its argument with an alternative request to this Court that, in the event the Court concludes Mr. Stone is entitled to a PPD award for his prior industrial injury to his right knee notwithstanding the pension decision in his low back claim, it limit the scope of its holding to cases involving workers who were pension before July 1, 2011. Mr. Stone has no objection.

III. CONCLUSION

Based on the foregoing Reply and the Brief of Appellant, Mr. Stone respectfully requests this Court reverse the May 16, 2011 Findings of Fact and Conclusions of Law and Judgment affirming the July 20, 2010 Board Decision and Order and remand this matter to the Department with directions (1) to reverse the June 2, 2009 Department orders and (2) (i) issue a new order closing the P-559303 claim with time loss compensation as paid through August 20, 2007 and with PPD for 45% permanent right lower extremity impairment minus previously-paid PPD and (ii) issue a new order closing the X-097249 claim with time loss compensation as paid through May 15,

2009, and finding Mr. Stone totally and permanently disabled and placing him on pension effective May 16, 2009 and that authorized treatment, including medications, may continue only for major depression and anxiety, and the coverage of treatment would not include controlled substances to alleviate pain (scheduled medications I through IV).

RESPECTFULLY SUBMITTED this ~~17th~~^{19th} day of January, 2012.

A handwritten signature in black ink, appearing to read "Robert A. Silber", written over a horizontal line.

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