

67209-6

67209-6

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.

BRIEF OF APPELLANT

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I. INTRODUCTION

This is a workers' compensation appeal. The Appellant is the injured worker, Steven J. Stone, and this matter involves Mr. Stone's entitlement to an award of permanent partial disability (PPD) for permanent impairment caused by a previous industrial injury in a prior workers' compensation claim entirely separate and distinct from his ~~entitlement to total permanent disability (pension) benefits proximately~~ caused by a subsequent industrial injury awarded in a later and different workers' compensation claim.

II. ASSIGNMENT OF ERROR

An injured worker who is awarded pension benefits as a totally and permanently disabled worker under the Industrial Insurance Act can also receive an award of permanent partial disability benefits in a prior claim for permanent impairment caused by a separate industrial injury that occurred before the permanently totally disabling injury when the prior injury had reached maximum medical improvement and was properly rated for impairment before the worker was deemed totally and permanently disabled by the Department for the subsequent injury regardless of whether the prior industrial injury is a proximate cause of the worker's permanent total disability.

This assignment of error establishes that the Superior Court's May 16, 2011 Findings of Fact and Conclusions of Law and Judgment is incorrect.

III. STATEMENT OF THE CASE

This is a workers' compensation case arising out of two separate and distinct industrial injuries Mr. Stone suffered while in the course of his employment with Summerville Steel Company.

Prior to his injuries, Mr. Stone enjoyed excellent physical and mental health. *CABR*¹, *Stone* 24-26. He did well in school, played baseball and football while in college, was a devoted hiker and mountain climber, trekked from Mexico to Canada on two occasions, and summited Mount Rainier 25 times. In fact, he moved to Washington State owing to the ample climbing opportunities. *Stone* 24-26.

Mr. Stone began his employment with Summerville Steel Company in September of 1989. *Stone* 26. The first industrial accident occurred on March 31, 1997 when he injured his right knee while picking up a bundle of steel and falling to the ground. *Stone* 27, *Schuster* 11. Worried about losing his job, he splinted his leg with a

¹ The Certified Appeal Board Record (CABR) is the record of this case before the Board of Industrial Insurance Appeals (Board). The CABR was included in the Clerk's Papers at Sub No. 5, which was filed with the Court of Appeals. The CABR includes transcripts from the Board hearing and perpetuation depositions, which transcripts are paginated separately; therefore, citations to transcript testimony will be by the witness' last name and transcript page number. Citations to other documents in the CABR will be by "CABR" and the large, stamped number in the lower right corner.

piece of wood and immediately returned to work. *Stone 27*. Approximately one week later, on April 7, 1997, he filed a claim for benefits (P-559303) with the Respondent, the Department of Labor and Industries (Department). *CABR 78*. The Department allowed the claim on April 17, 1997 and then closed it on June 19, 2000.² *Mickelson 7-8; CABR 78-79*.

The second industrial accident occurred four years later, on April 6, 2001, when Mr. Stone injured his low back and filed another claim for benefits (X-097249), which the Department allowed on April 27, 2001. *Mickelson 15-16; Stone 28; Schuster 12-13; CABR 74*. Mr. Stone received treatment for both his low back and mental health conditions³ proximately caused by the April 6, 2001 industrial injury and received time loss compensation owing to his inability to work due to the industrially-related low back and mental health conditions. *Stone 31-32*.

² The Department had initially closed the claim on July 23, 1998 with a permanent partial disability award for 5 percent permanent impairment of the right lower extremity, but the closing order was reversed on January 13, 2000 for further treatment; the Department once again closed the P-559303 claim on June 19, 2000. *CABR 79*.

³ The Department issued an order on May 16, 2008 accepting responsibility for depression determined by the medical evidence to be related to the April 6, 2001 industrial injury. *Mickelson 16; CABR 82*.

While he was receiving treatment and time loss benefits in the open X-097249 claim, Mr. Stone filed an application to reopen his prior right knee claim on October 10, 2003; the Department granted his application on January 27, 2004. *Mickelson 9-10; CABR 79-80.* His attending physician, David Kieras, M.D., performed two knee surgeries. The first procedure on May 16, 2005 was a valgus-producing high tibial osteotomy for the purpose of improving knee alignment and involved removing a wedge of bone from the knee and tilting the bone back to close the wedge, using a metal plate and screws to hold the position during healing. *Kieras 9-11; Schuster 13-14.* The second procedure on October 12, 2006 was to remove the metal plate and screws from the knee. *Kieras 10-12; Schuster 15.* By March 2007, approximately six months after the second surgery, Mr. Stone's right knee condition reached maximum medical improvement. *Kieras 14; Schuster 24-25.*

Despite Dr. Kieras' attempted surgical interventions to correct his knee misalignment and instability, Mr. Stone suffered increased impairment to his right lower extremity. Based in large part upon permanent moderate instability and the profound nature of the surgical intervention, Dr. Kieras opined Mr. Stone had suffered 45

percent permanent impairment to his right lower extremity as a proximate result of the March 31, 1997 industrial injury. *Kieras 18*. Gary Schuster, M.D., an independent medical consultant, testified Mr. Stone had even more impairment owing to finding greater instability upon clinical examination and rated his right knee at 54 percent. *Schuster 22-23*. Both Dr. Schuster and Dr. Kieras agreed Mr. Stone ~~was capable of full-time gainful employment when considering only~~ the right knee condition. Dr. Kieras testified he was so capable as of February 28, 2008; Dr. Schuster testified he was capable of gainful employment when considering only the right knee condition as of May 19, 2008. *Kieras 20; Schuster 21*.

Entirely consistent with the physicians' opinion that Mr. Stone was capable of full-time work with respect to the right knee condition, the Department terminated Mr. Stone's time loss benefits on August 20, 2007 in the P-559303 claim relative to his knee injury. However, the Department continued to pay Mr. Stone time loss compensation for another two years (to May 16, 2009) in his X-097249 claim relative to his low back and mental health conditions. *CABR 59-60*.

Given Mr. Stone's knee injury had reached maximum medical improvement in March 2007 as opined by his attending physician and

his time loss benefits were terminated with respect to his right knee claim, Mr. Stone requested the Department re-close the right knee claim on September 24, 2008 with a PPD award for at least 45 percent permanent impairment to his right knee. *Mickelson 12-13; Exhibit 1 [Board Hearing Transcript]*. Despite his request in September 2008, however, the Department did not close his right knee claim until nearly one year later when, instead of awarding PPD for his increased knee impairment, it consolidated the right knee injury with Mr. Stone's low back claim and awarded pension benefits. *CABR 59-60, 121-122*.

Specifically, on June 2, 2009, the Department issued an order in the knee claim confirming time loss benefits had ended nearly two years earlier, on August 20, 2007, and Mr. Stone was totally and permanently disabled as of May 16, 2009 due to the effects of his knee, low back, and mental health conditions. *CABR 59-60*. The order further indicated treatment would not be covered after the pension effective date and the pension would be administered in the low back/X-097249 claim. *CABR 59-60*. The Department also issued an order in the low back/X-097249 claim on June 2, 2009 ending time loss benefits as paid through May 15, 2009, finding Mr. Stone was

totally permanently disabled as of May 16, 2009 due to the effects of his knee, low back, and mental health conditions, authorizing treatment for major depression and anxiety after the pension effective date, and indicating the pension would be administered in the X-097249 claim. *CABR 121-122.*

In effect, the June 2, 2009 orders enabled the Department to escape paying Mr. Stone a PPD award for his increased right knee impairment by cleverly incorporating the once distinct and separate knee claim into the low back claim. Consequently, Mr. Stone appealed from both June 2, 2009 orders to the Board of Industrial Insurance Appeals (Board), which appeals the Board granted on July 16, 2009. *CABR 82-84.*

After receiving testimony from Mr. Stone, Dr. Kieras, Dr. Schuster, and pension adjudicator Barbara Mickelson, Industrial Appeals Judge (IAJ) Timothy Wakenshaw affirmed the June 2, 2009 orders, categorically concluding in Conclusion of Law No. 3 of his Proposed Decision and Order that Mr. Stone “cannot” receive an award of PPD for his March 31, 1997 industrial injury “because he was not totally and permanently disabled as a proximate result of only the effects of the industrial injury of April 6, 2001.” *CABR 54.*

On May 25, 2010, Mr. Stone petitioned the Board to review the IAJ's decision, citing well-established statutory and appellate case law supporting an injured worker certainly can lawfully receive PPD for a previous unrelated industrial injury prior to being classified as totally and permanently disabled in a subsequent claim regardless of whether the pre-existing injury imposes restrictions on the worker's ability to work. *CABR 18-28*. The Board granted review on June 8, 2010 but then affirmed the June 2, 2009 orders on July 20, 2010.

The stated basis of the Board decision was that "Mr. Stone cannot receive a PPD award under RCW 51.32.080 for the right knee condition proximately caused by the March 31, 1997 industrial injury, because there is no proof he was permanently totally disabled as a proximate result of the April 6, 2001 industrial injury alone, without taking into consideration the effects of the March 31, 1997 industrial injury." *CABR 6, 17*.

Mr. Stone timely appealed the July 20, 2010 Board Decision and Order to King County Superior Court on August 10, 2010. *Clerk's Papers (CP) 1-2*. Before the Honorable James Cayce, he sought PPD for the increased impairment to his right knee in the P-559303 claim independent from the total permanent disability benefits he was

awarded in the X-097249 claim, which pension benefits are not in dispute before the Court. *Board Hearing Colloquy 3*. On May 16, 2011, Judge Cayce entered Findings of Fact and Conclusions of Law and Judgment for the Department, affirming the July 20, 2010 Board Decision and Order that affirmed the June 2, 2009 Department orders issued in Claim Nos. P-559303 and X-097249. *CP 70-72*. Mr. Stone timely filed the current appeal. *CP 73-76*.

IV. ARGUMENT

The Department concedes Mr. Stone sustained increased permanent impairment to his right lower extremity as a proximate result of his March 31, 1997 industrial injury. *Mickelson 17*. The Department also recognizes Mr. Stone is totally permanently disabled based upon the combined effects of his more recent industrial injury and his pre-existing medical conditions including his right knee injury.

Moreover, the Department admits Mr. Stone was capable of full-time work at the time his claims were closed when considering only his right knee condition. *CABR 12*. Even so, the Department nevertheless contends that for Mr. Stone to also receive an award of PPD in the separate and distinct claim for his *prior* right knee injury he must prove his total permanent disability is due *solely* to his

conditions in the low back/X-097249 claim where the right knee injury does not contribute at all to his total permanent disability. Such contention is *not* supported by the law.

Appellate courts review questions of statutory interpretation *de novo*. *Tomlinson v. Puget Sound Freight Lines, Inc.*, 140 Wn. App. 845, 850, 166 P.3d 1276 (2007). The Industrial Insurance Act is to be liberally construed to reduce to a minimum the suffering and economic loss from industrial injury or occupational disease. RCW 51.12.010. Where reasonable minds can differ over the meaning of the Act's provisions, the court resolves all doubts in the injured worker's favor. *Cockle v. Dept. of Labor and Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001) (quoting *Dennis v. Dept. of Labor and Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)).

Significantly, RCW 51.32.060(4) provides, in pertinent part,

(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 cannot be clearer. A worker can receive *both* pension benefits in a current claim in addition to a PPD award for a

prior industrial injury and the statute does not impose the condition that the "further accident" be the sole cause of the worker's total permanent disability.

Notwithstanding this unambiguous statement of the law, our Supreme Court in *Clauson v. Dept. of Labor and Indus.*, 130 Wn.2d 580, 925 P.2d 624 (1996), confirmed a worker can receive an award of PPD for a prior injury in addition to pension benefits in a subsequent claim even when the prior industrial insurance claim is *pending* at the time the worker is classified totally and permanently disabled -- a fact scenario which mirrors Mr. Stone's.

In *Clauson*, the injured worker filed a claim for benefits in September 1974 for a right hip injury; the Department allowed the claim and then closed it in September 1980 with a PPD award. In January 1983, the worker filed a second workers' compensation claim for a low back injury. In April 1987, while the second claim was still open, the Department *reopened* the worker's first claim for further treatment including a hip replacement, after which the hip condition was deemed fixed and stable by August 1989. On August 16, 1989, the Department awarded pension benefits in the second claim and, even though the worker had sustained increased permanent hip

impairment, the Department nevertheless closed the first claim in October 1989, two months after the pension award, without additional PPD.

The *Clauson* court acknowledged a worker cannot receive a PPD award for an industrial injury that occurs *after* a total permanent disability classification. *Clauson v. Dept. of Labor and Indus.*, 130 Wn.2d at 585. However, the court distinguished that situation from the instant case where the worker sought a PPD award for an injury that he sustained *before* the injury that caused total permanent disability, and the court concluded the worker was indeed entitled to the PPD award for the prior injury notwithstanding he had already received pension benefits for the subsequent injury. *Clauson v. Dept. of Labor and Indus.*, 130 Wn.2d at 585-586.

In light of the mandate that any doubt as to the meaning of the workers' compensation law be resolved in favor of the worker, we hold that the worker here should not be denied benefits under his hip claim simply because his hip condition was not medically fixed and stable until one week after his claim was resolved.

Clauson v. Dept. of Labor and Indus., 130 Wn.2d at 586.

The facts in Mr. Stone's case are strikingly similar and, indeed, more favorable to Mr. Stone than those in *Clauson* in that his knee

injury had reached maximum medical improvement and he was deemed capable of work when considering only his knee injury *over two years* before the pension adjudication in his low back claim. To wit, Mr. Stone suffered a right knee injury at work on March 31, 1997, for which he filed the P-559303 claim and received treatment, and the claim was then closed on June 19, 2000. He then suffered on April 6, ~~2001 an entirely separate industrial injury to his low back for which he~~ filed the X-097249 claim. On January 27, 2004, the right knee injury claim was reopened for treatment including further right knee surgery but, by March 2007, his knee had reached maximum medical improvement. Instead of continuing to pay 50 percent of his temporary total disability benefits under his right knee claim and 50 percent under his low back claim, in August 2007, the Department transferred payment of all of Mr. Stone's time loss to his low back/mental health claim, thereby resolving any outstanding vocational issues in the knee claim and determining Mr. Stone was temporarily totally disabled by conditions covered in his low back/mental health claim. Mr. Stone regrettably did not appreciate much improvement from the second knee surgery and Dr. Kieras determined he suffered 45 percent permanent impairment to his right

lower extremity as a proximate result of the March 31, 1997 industrial injury. Dr. Schuster rated him with even greater impairment. Therefore, well before the Department adjudicated Mr. Stone's pension entitlement in the low back/mental health claim, all outstanding issues in his right knee claim, including his ability to work as a result of it, had been resolved. Both Dr. Kieras and Dr. Schuster confirmed he had returned to full-time wage earning capacity *when considering only his right knee condition*, and the Department should have closed his knee claim as early as August 2007. Because it did not, Mr. Stone proactively requested the Department to close his knee claim with an award of PPD for his significantly increased knee impairment, which request the Department conveniently ignored and instead delayed action for nearly one year and then hastily consolidated both claims to deprive him of the PPD award for his knee impairment. Surely, the law should not reward the Department for such inappropriate claim management tactics! Indeed, the Board of Industrial Insurance Appeals already considered this in similar circumstances and expressly denounced such delay tactics.

Specifically, in the Significant Board Decision, *In re: Roy Sulgrove*, BIIA Dec. 88 0869 (1989) – similar to Mr. Stone's case in

that the injured worker received a pension award but not a separate PPD award for a different injury – the Board held such administrative delay shall not be used to penalize a worker:

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 Sulgrove, BIIA Dec. 88 0869 at 2.

In Mr. Stone's case, the Department contends a separate PPD award is payable only "where the injury for which PPD is sought (1) occurred before his totally disabling injuries and (2) is unrelated to the totally disabling injuries," citing *McIndoe v. Dept. of Labor and Indus.*, 144 Wn.2d 252, 26 P.3d 903 (2001) and *In re: Earl Hollingsworth*, BIIA Dec. 96 6818, 96 6819, 96 6820 (1998). *CABR 10*. Significantly, however, not only is *McIndoe* distinguishable from Mr. Stone's case, its arguably ambiguous holding is subject to interpretation that does not in fact support the Department's proposition; furthermore,

Hollingsworth is not a Significant Decision from the Board and therefore not controlling in this matter.

McIndoe consisted of three separate but consolidated hearing loss appeals by three workers who were denied PPD benefits because they received pension benefits for different injuries prior to filing hearing loss claims. The only issue the *McIndoe* court was asked to address was “whether a worker who is classified permanently totally disabled and placed on pension may thereafter receive a PPD award for an unrelated occupational disease which developed prior to the pension award.” *McIndoe v. Dept. of Labor and Indus.*, 144 Wn.2d at 256.

Concerned that a worker might be inadvertently penalized for the mere sequence of filing claims, the *McIndoe* court held that, as long as the claim in which an award for PPD is sought is for a work-related condition that occurred *before* the second injury, the worker can receive PPD for the first injury regardless of when the worker files the claim for it:

The timing of claims is a function of the nature of some occupational diseases, thus the sequencing of filing of claims should not deprive the workers of their rights to benefits.

McIndoe v. Dept. of Labor and Indus., 144 Wn.2d at 265.

The *McIndoe* court did *not* expressly hold that the prior industrial injury for which PPD is sought cannot be a cause of the worker's total permanent disability in order for the worker to recover PPD. It merely clarified that, for a worker to receive both permanent partial *and* permanent total disability benefits, the worker must have ~~two separate industrial insurance claims:~~

Payment made for permanent partial disability is deducted from amounts otherwise payable for permanent total disability unless the partially disabling condition is unrelated to the totally disabling injury. Thus, if an injury that was classified as partially disabling is later determined to cause permanent total disability, earlier payments are recouped by adjusting the pension. *RCW 51.32.080(4)*. However, *RCW 51.32.060(4)* specifically allows **full payment of permanent partial disability** claims for injuries occurring prior to, and unrelated to, the permanent total disability claim.

McIndoe v. Dept. of Labor and Indus., 144 Wn.2d at 263 (emphasis added).

In Mr. Stone's case, on this principle, all parties agree. For a worker to recover both PPD and pension, he or she must have two different claims. Whether the *McIndoe* court insinuated more -- namely that the prior injury cannot be a cause of the worker's

permanent total disability -- is at best unclear. Significantly, the Industrial Insurance Act's provisions are to "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. "Courts, therefore, are to resolve doubts as to the meaning of the IIA in favor of the injured worker." *McIndoe v. Dept. of Labor and Indus.*, 144 Wn.2d at 257. Clearly, it would be error to resolve any doubt as to the legal authority concerning the present PPD entitlement issue in the *Department's* favor.

Indeed, heightened caution concerning adopting the Department's interpretation is particularly warranted since the *McIndoe* court expressly warned *against* linking a worker's PPD entitlement to the worker's wage earning capacity, which the Department seemingly advances in Mr. Stone's case. Here, the Department suggests Mr. Stone must establish his total permanent disability is due solely to his low back and mental health conditions without any pre-existing limitations and disability from the right knee condition; in other words, if his right knee condition was a cause of his inability to work -- i.e., contributed to his compromised wage earning

capacity -- Mr. Stone is not entitled to an award of PPD for his increased right knee impairment. The *McIndoe* court would disagree:

In fact, it is error to consider loss of earning power in fixing an award for permanent partial disability. *Cayce v. Dept. of Labor and Indus.*, 2 Wn. App. 315, 317, 467 P.2d 879 (1970). This is so because 'permanent total and permanent partial disability are not different levels on the same continuum, but are two separate concepts.' *Ellis v. Dept. of Labor and Indus.*, 88 Wn.2d 844, 851, 567 P.2d 224 (1977). Permanent total disability classification means it has been determined that the worker's condition is permanent and prevents the worker from returning to gainful employment. Permanent partial disability benefits, on the other hand, are awarded on the basis of loss of bodily function. *Page*, 52 Wn.2d at 711. A worker's earning power does not determine the amount of the permanent partial disability award because two individuals who have the same loss of function are entitled to the same permanent partial disability award. *WAC 296-20-200(4)*. While the loss of a finger, for example, might have little disabling effect on a stevedore, it would be devastating to the earning ability of a pianist. *Fochtman*, 7 Wn. App. at 294. Thus, a permanent partial disability award is not specifically tied to wage earning ability.

McIndoe v. Dept. of Labor and Indus., 144 Wn.2d at 261-262.

Equally significant, to accept the Department's interpretation -- that Mr. Stone must prove he is totally permanently disabled due solely to his low back and mental health conditions to be eligible for a PPD award for his prior right knee injury -- would, in essence, render

meaningless RCW 51.32.060(4)⁴, which unambiguously allows a worker to receive both PPD and pension awards for separate industrial injuries. More often than not, a worker who was previously classified as permanently *partially* disabled has corresponding restrictions and limitations from the injury that limit his or her employment and employability which, in turn, may result in his or her classification as a permanently *totally* disabled worker when combined with a subsequent industrial injury in the future. In fact, the law is well-established on this point. When assessing whether a worker is capable of gainful employment, the Department *must* consider the worker as a whole person with all pre-existing disabilities and infirmities together with the industrial injury. *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).

Adopting the Department's argument that, to receive a PPD award for a prior injury, the worker must prove his or her current

⁴ RCW 51.32.060(4) provides,

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).

permanent total disability is due solely to the subsequent injury, would devastatingly harm scores of workers who previously received PPD awards for prior industrial injuries, injuries which later, when combined with subsequent injuries, render the workers totally permanently disabled. The logical extrapolation from the Department's argument is that scores of workers should return their PPD awards to the ~~Department in the event they are later found totally permanently~~ disabled.

In any event, the Department itself decided Mr. Stone's total disability was proximately related to conditions covered in his low back claim and not due to the knee injury when it transferred his temporary total disability payments to the low back claim in August 2007 as adjudicated in the June 2, 2009 Order in the P-559303 claim. Moreover, the Department conceded at hearing Mr. Stone's entitlement to total permanent disability benefits is not at issue and it was therefore unnecessary to present medical testimony in that regard.

Here, the evidence incontrovertibly establishes Mr. Stone's right knee injury occurred before his low back injury; his right knee injury had reached maximum medical improvement as early as March

2007, close to two years prior to the Department deeming him totally and permanently disabled in his low back/mental health claim; his time loss had stopped in his knee claim and both Dr. Kieras and Dr. Schuster confirmed he was capable of full-time work when considering solely his right knee condition; and Mr. Stone had sustained increased permanent right lower extremity impairment of at least 45 percent as a proximate result of the March 31, 1997 industrial injury. Therefore, according to statutory and case law, PPD is payable for Mr. Stone's increased right knee impairment in the P-559303 claim.

V. ATTORNEY FEES ON APPEAL

Mr. Stone is entitled to an award of attorney fees and expenses on appeal pursuant to RCW 51.52.130. See also RAP 18.1. This statute provides that "a reasonable fee for the services of the worker's or beneficiary's attorney" shall be awarded if a decision or order is "reversed or modified and additional relief is granted to a worker or beneficiary." RCW 51.52.130. Here, Mr. Stone seeks to reverse the Superior Court Judgment and Board Decision and Order and remand this matter to the Department for a PPD award for the increased permanent impairment to his right lower extremity. Thus, Mr. Stone

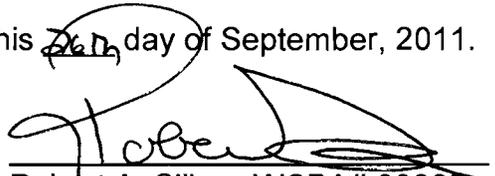
should be entitled to an award of attorney fees and expenses for his attorneys' work on the matter before this Court and the Superior Court or the opportunity to file a supplemental motion for attorney fees and costs in the event he is successful in reversing the Department order denying the PPD award, thereby securing additional relief as a direct consequence of his success before this Court. See *Brand v. Dept. of Labor and Indus.*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999).

VI. CONCLUSION

Based on the foregoing, 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). Mr. Stone further requests an award for his reasonable attorney fees and costs pursuant to RCW 51.52.130 and RAP 18.1.

RESPECTFULLY SUBMITTED this ~~26th~~ 26th day of September, 2011.

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

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CAUSE NO.: 67209-6

DOCUMENTS: Brief of Appellant

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