

NO. 67209-6-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

STEVEN J. STONE,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
FOR THE STATE OF WASHINGTON,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

The Industrial Insurance Act (Act) authorizes two types of benefits that may be provided to a worker once the worker's disability has become fixed: permanent partial disability awards and permanent total disability benefits. Permanent partial disability awards are provided when a worker is capable of employment following an injury, but suffers a permanent loss of bodily function. *See* RCW 51.08.150; RCW 51.32.080. These benefits are often referred to as "lump-sum" benefits, because the benefit is a one-time award that has a statutorily defined value.

On the other hand, permanent total disability benefits are provided to workers who are rendered incapable of employment as a result of an injury. *See* RCW 51.08.160; RCW 51.32.060. A worker who is permanently and totally disabled receives monthly wage-replacement benefits for the rest of his or her life. Permanent total disability benefits are commonly referred to as "pension" benefits.

Here, Steven Stone received a pension for the "combined effects" of two injuries. The term "combined effects pension" refers to a situation where a worker is permanently and totally disabled as a proximate result of two (or more) industrial injuries. Notwithstanding the award of a pension, Mr. Stone seeks permanent partial disability for one of the injuries.

Under the Act, a worker who is permanently and totally disabled as a proximate result of an injury is entitled to payment of wage-replacement benefits but is not eligible for an additional award of permanent partial disability in conjunction with pension benefits under that claim. *See Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 37 n.1, 992 P.2d 1002 (2000) (stating that when a worker's condition is fixed, the worker "receives either a pension or a permanent partial disability award"). It follows that if a worker is permanently and totally disabled as a result of the combined effects of two industrial injuries, and if neither injury, standing alone, would have been sufficient to cause the worker to become permanently and totally disabled, then the worker is entitled to pension benefits but may not also receive an additional award of permanent partial disability for either of those injuries. Thus, the Department of Labor and Industries (Department), Board of Industrial Insurance Appeals (Board), and superior court all properly rejected Stone's request to supplement his pension with permanent partial disability benefits.

II. COUNTER STATEMENT OF THE ISSUES

Where a worker has been placed on a pension for the combined effects of two injuries, and where it is a verity on appeal that the worker was rendered permanently and totally disabled as a result of both injuries, may the worker receive an additional award of permanent partial disability benefits for one of those injuries in addition to the pension?

III. STATEMENT OF THE CASE

A. History Of The Department's Adjudication Of Stone's Claims

Stone injured his right knee working at Summerville Steel in 1997. CABR Stone 26.¹ The Department allowed the claim (Claim No. P-559303), paid benefits, and closed the claim in 2000. CABR 3-4. In 2001, again while working for Summerville Steel, he injured his low back. CABR Stone 28. The Department allowed the back claim, and ultimately accepted major depressive and anxiety disorders as conditions that were proximately caused by the back injury. CABR 4-5.

In 2003, while the back claim was still open, the Department reopened the knee claim at Stone's request. CABR 4. In May 2005, Dr. David Kieras operated on Stone's right knee. CABR Kieras 9-10. In October 2006, Dr. Kieras removed the hardware from that 2005 surgery. CABR Kieras 9-10.

In late 2008, Barbara Mickelson, a pension adjudicator for the Department, reviewed Stone's claim for the purpose of deciding whether he was permanently and totally disabled as a result of the right knee claim, the back claim, or both claims. CABR Mickelson 15. In order to place Stone on a pension, the Department had to first find that he was permanently and

¹ "CABR" references the Certified Appeal Board Record. References to Board pleadings and orders are to the page number stamped by the Board in the lower right corner of the page. Transcripts in the CABR are separately numbered, and references will be to the name of the witness and page number of the transcript.

totally disabled. CABR Mickelson 17. In making pension determinations, the Department takes into account relevant medical records and vocational issues. CABR Mickelson 18, 22.

On April 1, 2009, the Department issued two orders, each of which found Stone to be permanently and totally disabled as a result of the combined effects of both injuries. CABR Mickelson 17; CABR 57-58 (order issued under knee claim); CABR 119-120 (order issued under back claim). The back claim order contained a typographical error.² CABR 59-60, 121-22. The Department issued corrected orders under both claims on June 2, 2009, fixing that error. CABR 59-60, 121-122. The pension was administratively paid out of the back claim. CABR 59-60, 121-122.

Stone appealed the June 2, 2009 orders to the Board, seeking an additional permanent partial disability award for his right knee in addition to the pension that was provided under both that claim and the knee claim. CABR 86. He presented the evidence of his treating physician, Dr. Kieras, and a forensic examiner, Dr. Gary Schuster.

Dr. Kieras testified that based on the type of surgeries that he performed on Stone in 2005 and 2006, he “*would have* considered him to be at maximum medical improvement” about six months after the 2006 surgery. CABR Kieras 14 (emphasis added). However, Dr. Kieras did not testify that

² It cited the P claim as “P55303” instead of the correct “P559303.” CABR 59-60, 121-22.

he actually had a visit with Stone six months post-injury, nor did he testify that he informed the Department in 2007 that he considered Stone to be at maximum medical improvement.

In September 2008, Dr. Kieras saw Stone for the purpose of conducting an “impairment examination”; i.e., to conduct a clinical examination that would allow him to form an opinion regarding the extent of Stone’s permanent partial disability in his right knee. CABR Kieras 14-15; CABR, Ex. 1. Based on this examination, Dr. Kieras concluded that Stone had 45 percent right knee impairment. CABR Kieras 18. There is no evidence that Dr. Kieras had performed an “impairment examination” on Stone’s right knee before September 2008, nor is there any evidence that Dr. Kieras had formed an opinion regarding the extent of Stone’s right knee impairment before the September 2008 impairment examination, nor that he informed the Department that he thought Stone had permanent right knee impairment before September 2008.

Dr. Schuster examined Mr. Stone in May 2008. CABR Schuster 8. Based on his examination, he concluded that Stone had 54 percent right knee impairment. CABR Schuster 22-23. Dr. Schuster reviewed medical records as part of his evaluation of Stone’s right knee impairment. CABR Schuster 11-15. None of the records that he testified to reviewing indicated that any medical provider had informed the Department that Stone’s right

knee had reached maximum medical improvement. *See* CABR Schuster 11-15.

Neither Dr. Kieras nor Dr. Schuster testified that Stone was permanently and totally disabled solely because of his back injury, nor did either of them testify that the right knee injury was not at least a proximate cause of his permanent total disability. Both limited their testimony to whether Stone could work, based only on his right knee condition, considered apart from the back condition. *See* CABR Kieras 20; CABR Schuster 21. Based only on the limitations imposed by the right knee condition, both doctors thought Stone could have worked. CABR Kieras 20, CABR Schuster 21.

B. The Board And The Superior Court Found That Both Of Stone's Injuries Proximately Caused Him To Be Permanently And Totally Disabled; A Fact That Is A Verity

On April 14, 2010, the judge who was assigned to hear the case by the Board issued a proposed decision and order that affirmed the Department's orders. CABR 47-54. Stone filed a petition for review to the full Board. CABR 18-28. The Board granted review, but it ultimately issued a decision and order that affirmed the Department's orders. CABR 2-7.

The Board entered findings of fact and conclusions of law consistent with its decision to affirm the Department orders under appeal.

See CABR 3-6. Specifically, its findings of fact numbers 9 and 10 stated:

9. As of May 16, 2009, Mr. Stone was permanently unable to engage in reasonably continuous gainful employment as a proximate result of the March 31, 1997 [right knee] and April 6, 2001 [low back and mental health] industrial injuries.
10. There was no proof that Mr. Stone was permanently unable to engage in reasonably continuous gainful employment as a proximate result of the April 6, 2001 [low back and mental health] industrial injury alone, without taking into consideration the effects of the March 31, 1997 [right knee] industrial injury.

CABR 5-6.

The Board's conclusions of law numbers 2 and 3 stated:

2. As of May 16, 2009, Mr. Stone was permanently totally disabled within the meaning of RCW 51.08.160 as a proximate result of the March 31, 1997 and April 6, 2001 industrial injuries.
3. Mr. Stone cannot receive a permanent partial disability 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.

Stone appealed the Board's final order to superior court. CP 1-2.

The superior court affirmed the decision of the Board (which, itself, affirmed

the Department). CP 70-72. The judgment expressly adopted all of the Board's findings of fact, including finding of fact number 9 and finding of fact number 10. CP 70-72.

Stone appealed the superior court's decision to this Court. CP 73-76.

Stone's assignment of error asserts that "regardless" of whether his right knee injury was a proximate cause of his permanent total disability, he is eligible for an additional award of permanent partial disability for his knee injury as well as a pension under both his knee claim and his back claim. AB 1. His assignment of error does not challenge the superior court's finding that his right knee injury was a proximate cause of his permanent total disability, nor does he challenge any of the superior court's other findings of fact.³ See AB 1. Rather, he argues that it does not matter whether the right knee injury was a proximate cause of his permanent total disability when deciding whether he may receive an award of permanent partial disability for that claim. AB 1.

Because Stone does not assign error to any of the superior court's findings of fact, all of its findings of fact are verities on appeal. AB 1. *In re Estate of Lint*, 135 Wn.2d 518, 531-33, 957 P.2d 755 (1998) (stating that if

³ Stone states, in conclusory fashion, that his assignments of error establish that the superior court's findings and conclusions are incorrect. AB 1. However, his assignment of error does not directly challenge any of the court's specific findings of fact, and he assigns error only to the superior court's conclusion of law that Stone is not eligible for an award of permanent partial disability for his right knee. See AB 1.

an appellant does not assign error to specific findings of fact and “present the court with argument as to why specific findings of the trial court are not supported by the evidence...”, the findings are verities on appeal.)

As Stone did not assign error to any specific finding of the trial court, he does not—and cannot—dispute the trial court’s finding that he is permanently and totally disabled as a proximate result of both his right knee injury and his back injury, nor can he dispute its finding that the back injury alone would not have produced permanent total disability but for the additional disability caused by the aggravation of his right knee.

IV. SUMMARY OF THE ARGUMENT

A worker cannot receive permanent partial disability and permanent total disability awards for the same injury. Here, Stone received permanent total disability benefits because of both injuries, and, therefore, cannot receive a permanent partial disability award for either injury.

The Board has issued multiple decisions which held that a worker who is permanently and totally disabled due to the combined effects of two or more injuries may not receive additional permanent partial disability awards for any of the injuries that proximately caused the worker’s permanent total disability. These decisions are consistent with the analysis employed by the Supreme Court in *Clauson v. Department of*

Labor & Industries, 130 Wn.2d 580, 925 P.2d 624 (1996) and *McIndoe v. Department of Labor & Industries*, 144 Wn.2d 252, 26 P.3d 903 (2001), which discussed the circumstances under which a worker may receive a pension from one injury and a permanent partial disability award from a previous injury. The key to the Court's analysis in both of those cases was the fact that the injury that merited the permanent partial disability award was *unrelated* to the injury that caused the worker to be permanently and totally disabled.

Stone argues that RCW 51.32.060(4) supports him. This contention fails to survive careful scrutiny. RCW 51.32.060(4) plainly states that a worker may receive permanent total disability benefits "notwithstanding" a prior payment of permanent partial disability. It does not state that a worker who is permanently and totally disabled as a proximate result of two injuries may receive an additional permanent partial disability award for one of those injuries as well as a pension.

Finally, the legislature recently clarified the law of permanent partial disability. *See* Laws of 2011, ch. 37, § 401. The legislature clarified RCW 51.32.080(4) by noting that a worker may be permanently and totally disabled as a result of more than one injury, and that, when a worker is permanently and totally disabled as a result of multiple injuries, all permanent partial disability benefits that were previously paid on any

of those claims are subject to recovery. This clarification to the statute makes it even more apparent that Stone may not receive an additional permanent partial disability award for his knee injury, since he is being placed on a pension for the combined effects of the knee injury and the back injury.

V. STANDARD OF REVIEW

As the Supreme Court has explained, an appellate court's role is "limited to reviewing the Board's administrative record to determine whether the superior court's findings are supported by substantial evidence and to determine whether the superior court's conclusions of law follow from its findings of fact." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999). Like the superior court, this Court may not consider any evidence that was not presented to the Board. *Id.*; *see also* RCW 51.52.110. Moreover, as Stone did not assign error to any of the superior court's findings of fact, he has waived the right to argue that any of the superior court's findings are not supported by substantial evidence. *Lint*, 135 Wn.2d at 531-33.

This Court reviews a superior court's legal conclusions de novo. *Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997). However, when an administrative agency is charged with application of a statute, the agency's interpretation of an ambiguous

statute is accorded great weight. *City of Pasco v. Pub. Empl. Relations Comm'n*, 119 Wn.2d 504, 507-08, 833 P.2d 381 (1992). The Department's interpretations of the Act are entitled to great deference, and the courts "must accord substantial weight to the agenc[ies'] interpretation of the law." *Littlejohn Const. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994). Both the Department and the Board's interpretations of the Act are entitled to consideration. *Ackley-Bell v. Seattle Sch. Dist. No. 1*, 87 Wn. App. 158, 165, 940 P.2d 685 (1997).

VI. ARGUMENT

A. **Because Stone Is Permanently And Totally Disabled As A Proximate Result Of Two Injuries, He May Not Receive An Award Of Permanent Partial Disability For Either Injury**

1. **A worker cannot be permanently and totally disabled and permanently and partially disabled at the same time as a proximate result of the same injury**

As a starting point it is helpful to consider two fundamental principles that underlie the Act. First, a worker is not eligible for any sort of disability benefit, including a permanent partial disability award, unless the industrial injury was a proximate cause of that disability. *E.g.*, *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623-25, 17 P.3d 1195 (2001) (approving of instruction that informed jury that worker could not receive benefits under the Act unless the injury was a

proximate cause of the worker's condition). Second, a worker cannot be both totally disabled and partially disabled at the same time as a proximate result of the same injury. *Hubbard*, 140 Wn.2d at 37 n.1 (stating that when a worker's claim is ready for closure, the worker receives either a pension or a permanent partial disability award). When those principles are applied to the facts of this case, it is apparent that Stone is not entitled to an award of permanent partial disability for either his knee injury or his back injury, because it is a verity on appeal that he is permanently and totally disabled as a proximate result of both of those injuries.

Common sense dictates that a worker cannot be partially disabled and totally disabled at the same time as a proximate result of the same injury. Furthermore, this conclusion is consistent with the plain language of the statutes that relate to permanent partial disability and permanent total disability. *See* RCW 51.32.060 (permanent total disability awards); RCW 51.32.080 (permanent partial disability awards); RCW 51.08.160 (defining permanent total disability); RCW 51.08.150 (defining permanent partial disability).

Permanent total disability means "loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation." RCW 51.08.160. In contrast, RCW 51.08.150

defines permanent partial disability to mean “the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments were severed where repair is not complete, or any other injury known in surgery to be permanent partial disability.” RCW 51.08.150.

Thus, the statutory definitions of permanent partial disability and permanent total disability are mutually exclusive. If a worker has lost both arms, both legs, vision, or has become paralyzed as a result of an injury, then the worker was totally, not partially, disabled. Furthermore, if a worker is rendered unable to work at any gainful basis as a result of the injury, then the worker’s disability is total, not partial. Alternatively, a worker who is able to work notwithstanding an injury, and who has *not* lost both arms, both legs, all vision, or become paralyzed as a result of the injury is *not* permanently and totally disabled, but may qualify for an award of permanent partial disability.

Furthermore, the Supreme Court has recognized that a worker may either receive a pension or receive an award for permanent partial disability, but may not properly receive both under the same injury. As *Hubbard* explains, “[i]f a temporarily disabled worker does not fully recover but instead reaches a static impaired condition, the worker’s classification is changed from temporarily disabled to permanently

disabled and the worker receives *either* a pension *or* a permanent partial disability award.” *Hubbard*, 140 Wn.2d at 37, n.1 (emphasis added).

Likewise, the Board has issued decisions that recognize that there may not be “compensation for both permanent partial disability and permanent total disability” for the same injury. *See, e.g., In re Allen Wood*, BIIA Dckt. No. 94 1328, 1995 WL 566037, *1 (1995). This is because permanent total disability and permanent partial disability are alternative remedies, and a worker cannot be entitled to both benefits at the same time for the same injury. *In re Donna Hutchinson*, Dckt. No. 05 15312, 2006 WL 2954304, *1 (2006); *see also In re Cheryl Austin*, Dckt. Nos. 05 217130 & 05 21730-A, 2007 WL 4565295, *2 (2007) (industrial appeals judge erred in awarding both partial and total benefits “as an individual cannot logically be both simultaneously.”).

That permanent partial disability and permanent total disability are mutually exclusive forms of disability is further reinforced when one remembers the key distinction between the two types of disability benefits. As a general matter, a worker is permanently totally disabled if the worker has been rendered unable to work as a result of an injury.⁴ *See Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 586-87, 880 P.2d 539

⁴ A worker is per se permanently and totally disabled if the worker has a “loss of both legs, or arms, or one leg and one arm, total loss of eyesight, [or] paralysis” as a result of an injury. RCW 51.32.060. Such workers need not present evidence showing that they are unable to work—their total disability is presumed.

(1994); *Shea v. Dep't of Labor & Indus.*, 12 Wn. App. 410, 415, 529 P.2d 1131 (1974). Conversely, a worker is partially disabled if he or she retains the capacity to earn a gainful wage, but has suffered a permanent loss of bodily function. *Williams*, 75 Wn. App. at 586-87.

As the *Williams* Court explains it, “[i]f the claimant cannot engage in any gainful employment, the permanent disability is total; if she can engage in some type of gainful employment on a reasonably continuous basis notwithstanding her medical condition, the permanent disability is partial.” *Id.* Since a given injury cannot, simultaneously, cause a claimant to be able to work and unable to work, a given injury cannot, simultaneously, cause both partial disability and total disability.

Here, the Department determined that Stone was permanently and totally disabled as a proximate result of the combined effects of his knee injury and his back injury. The Department further determined that neither injury, standing alone, was sufficient to cause him to be permanently and totally disabled. Therefore, the Department awarded him permanent total disability benefits under both claims, with the benefits, for administrative purposes only, being paid out under the back injury claim.

The Board and the superior court each concluded that Stone was permanently and totally disabled as a proximate result of both injuries, and that the back injury would not have resulted in permanent total disability

but for the additional disability caused by the knee injury. CABR 2-6. CP 70-72. This finding is a verity. *See supra* discussion at 8-9, 11. 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.

2. The Board, like the Department, has concluded that a worker who is permanently and totally disabled by the combined effects of two injuries is not entitled to an award of permanent partial disability for either injury

The Board has issued two significant decisions⁵ under RCW 51.52.160 that expressly concluded that a worker who is permanently and totally disabled as a result of the combined effects of two injuries is not eligible for an award of permanent partial disability for either of those injuries. *See In re Eddy Maupin*, BIIA Dec., 04 14768, 2005 WL 3802581 (2005); *In re Joanne Lusk*, BIIA Dec., 89,2984, 1991 WL 246461 (1991).

⁵ The legislature has directed the Board to designate, index and make available to the public its significant decisions. RCW 51.52.160.

While this Court is not required to follow decisions of the Board, it often finds it helpful to consider the Board's decisions. *See, e.g., Ackley-Bell*, 87 Wn. App. at 158. Furthermore, where, as here, the Board and the Department have reached the same conclusion with regard to the proper application of the Act to a complex legal issue, deference is particularly appropriate.

In *Joanne Lusk*, a worker suffered an injury to her left leg and ankle in 1978. *Lusk*, 1991 WL 246461 at *2. This claim was closed in 1979 with a permanent partial disability award, reopened in 1980, and closed again, with an increased permanent partial disability award, in 1982. *Id.* In 1983, the worker suffered a new injury to her neck and shoulders. *Id.* In 1985, while her neck and shoulder claim was still open, the worker's leg and ankle condition worsened, and that claim was reopened. *Id.* From that point onwards, both of the worker's claims were open until the Department eventually closed both claims in 1989 with a finding that the worker had become permanently and totally disabled as a result of the combined effects of both injuries. *Id.* Therefore, the Department granted her permanent total disability benefits, but did not grant her a further award of permanent partial disability. *See id.*

The Board affirmed the Department, holding that when a worker is permanently and totally disabled as a proximate result of the combined

effects of two injuries, the worker may not receive a permanent partial disability award for either injury as a matter of law. *Lusk*, 1991 WL 246461 at *2-*3. The Board noted that if the worker had rebutted the Department's finding that the combined effects of both injuries had proximately caused the worker's total disability, then the worker might well be eligible for a permanent partial disability award for one of those injuries, but, having failed to prove that that was true, no permanent partial disability award could be made. *See id.*

The facts in this case mirror those in *Lusk*. Stone injured his knee in 1997, and the claim was closed in 2000. CABR 3-4. He had a back injury in 2001, and his knee became aggravated in 2003. CABR 3-4. Both of his claims remained open until 2008, when both claims were closed with a finding that the combined effects of both injuries caused him to be permanently and totally disabled. CABR 4-5. Like Ms. Lusk, he failed to show that his permanent total disability was caused entirely by his second injury, and, thus, is not eligible for an award of permanent partial disability for his first injury. *Compare Lusk*, 1991 WL 246461 at *2-3 with CABR 5. CP 70-72.

Likewise, in *Maupin*, the Board again held that a worker who is permanently and totally disabled as a result of the combined effects of two injuries is not entitled to a further award of permanent partial disability for

either of those injuries in addition to the pension benefits. *Maupin*, 2005 WL 3802581 at *2-*3. The worker had a shoulder injury in 1988, and a back injury in 1991. *Id.* at *3. His shoulder claim was closed with a permanent partial disability award in 2002. *Id.* However, he protested the 2002 closing order, and the Department put it abeyance, and the claim remained open. *Id.* The Department then closed both the shoulder claim and the back claim in 2004 with a combined effects pension. *Id.* The Department did not award any additional permanent partial disability for either of those injuries. *Id.* at *2-*3. The Board agreed with the Department that no further award for permanent partial disability could be made to the worker for either of those claims. *Id.* However, the Board reversed the Department's decision to subtract the *full amount* of the 2002 permanent partial disability award from the pension reserves, finding that inconsistent with the "first instance" rule embodied within RCW 51.32.080(4).⁶ *Id.* at *2-*4.

⁶ Under the former version of RCW 51.32.080(4) (2007), the Department must subtract the pension benefits that the worker would have received from the workers' permanent partial disability awards had he or she been placed on a pension at the "first instance"; i.e., at the time that the worker was first granted an award of permanent partial disability. For example, if a worker received a small permanent partial disability award in 2000, the worker's claim was reopened in 2001, and the worker was ultimately placed on a pension in 2010, the Department would have to subtract the pension benefits that the worker would have received had he or she been placed on a pension in 2000 from the worker's permanent partial disability award, and only the remaining amount, if any, would be subject to recovery. *See* former RCW 51.32.080(4) (2007). As a practical matter, the worker in this example would probably not have any amount of the prior permanent partial disability award subject to recovery after the "first instance"

Finally, the Board has also issued a decision that it did not designate as significant, *In re Earl Hollingsworth*, BIIA Dckt., 96 6818, 96 6819, 96 6820, 1998 WL 775364 (1998), which, like *Lusk* and *Maupin*, concluded that a worker who is permanently and totally disabled as a result of the combined effects of two injuries is not entitled to a further award of permanent partial disability under either of those claims. *Compare Hollingsworth*, 1998 WL 775364 at *2-*4, with *Lusk*, 1991 WL 246361 at *2-*3, and *Maupin*, 2005 WL 3802581 at *2-*3.

In *Hollingsworth*, the worker suffered three injuries, and the worker presented evidence that those injuries became fixed and stable at different times. *Hollingsworth*, 1998 WL 775364 at *2-*4. However, the Board concluded that that evidence did not demonstrate that the worker was entitled to a permanent partial disability award on one or more of the worker's claims (and a pension under another of the claims), because the worker failed to rebut the Department's finding that the worker was permanently and totally disabled due to the combined effects of all three injuries. *See Hollingsworth*, 1998 WL 775364 at *2-4.

The Board observed that it would be difficult to separate the worker's three claims because there was a complex "interrelationship" between them. *See id.* at *3. The Board explained that the Department

calculation was performed, because it is likely that ten years of pension benefits would exceed the permanent partial disability that was awarded in 2000.

must assess both a worker's need for medical treatment and the worker's ability to work. *Hollingsworth*, 1998 WL 775364 at *3. The Department cannot effectively assess a worker's ability to work while the worker is undergoing medical treatment for one or more of the worker's injuries. *See id.* Thus, one cannot assume that the Department improperly delayed claim closure of any of the three claims simply because the three injuries became fixed and stable at different times. *See id.*

Stone does not mention either the *Lusk* or the *Maupin* decision, nor does he attempt to distinguish those cases. Stone responds to *Hollingsworth* only by noting that it was not designated as a "significant" decision (AB 15), but he does not offer any real argument as to why *Hollingsworth's* analysis should be disregarded by this Court.

Instead, Stone argues (AB 14-15) that his request for a permanent partial disability award is supported by the Board's decision in *In re Roy T. Sulgrove*, BIIA Dec., 88 0869, 1989 WL 164574 (1989). However, the worker in the *Sulgrove* case, like the workers in the *McIndoe* and *Clauson* cases, and unlike Stone, was permanently and totally disabled due to one injury alone, and was permanently and partially disabled due to an entirely unrelated condition. *Compare Sulgrove*, 1989 WL 164574 at *1-*3 with *McIndoe*, 144 Wn.2d at 263 and *Clauson*, 130 Wn.2d at 585-86. Thus, the *Sulgrove* case is readily distinguishable from Stone's

case, as Stone was permanently and totally disabled due to the combined effects of both of his injuries, and he is not seeking a permanent partial disability award for a condition that is unrelated to his status as a totally disabled worker. *See Sulgrove*, 1989 WL 164574 at *1-*3.

In *Sulgrove*, the worker sustained his first injury in 1980. *Sulgrove*, 1989 WL 164574 at *1. In March 1986, while his first injury claim was still open, the worker filed a second claim alleging that he had an asbestos-related occupational disease. *Id.* The Department took no action on the asbestos-related claim of any kind, and made no decision as to whether or not to allow that claim, for 17 months. *Id.* In September 1987, the Department placed the worker on a pension under his first injury claim alone. *Id.* Eleven days after it placed him on a pension for his first injury claim, the Department allowed the asbestos claim, which was the first action of any kind that the Department took with regard to the asbestos claim. *Id.* Two months later, the Department closed the asbestos claim with no award for permanent partial disability. *Id.* The Department contended that the worker could not receive an award of permanent partial disability for his asbestos claim because that claim was closed after he was placed on a pension. *See id.* at *1-*2.

The Board rejected the Department's argument, and concluded that the worker was, or at least might be⁷, eligible for a permanent partial disability award for his asbestos claim. *See Sulgrove*, 1989 WL 164574 at *2-*3. The Board reasoned that mere administrative delay, standing alone, should not determine whether a worker may receive a permanent partial disability award for a claim. *Id.* at *3.

Critically, the worker in *Sulgrove* was permanently and totally disabled solely as a result of his first injury. *See Sulgrove*, 1989 WL 164574 at *2. There was no evidence that the asbestos condition somehow contributed to that status. *See id.* at *1-*3. Furthermore, since the Department had not even allowed the asbestos claim until after placing the worker on a pension for his first injury claim, the Department was not, in any sense, compensating the worker for the "combined effects" of the disability related to both of those claims when it placed the worker on a pension.

Stone, citing to the Board's reference to "administrative delay" in *Sulgrove*, suggests that since the Department allegedly delayed closing his

⁷ The Board remanded the case to the Department with directions that it determine which of the worker's two injuries was the first to become medically fixed and stable. *Sulgrove*, 1989 WL 164574 at *2-*3. It appears that the Board's reasoning was that the worker would be eligible for a permanent partial disability award under the asbestosis claim if, and only if, the asbestos-related condition became fixed and stable before the other injury became fixed and stable, but the Board did not hold that this was true. *See id.*

knee claim, it follows that the Department must grant him a permanent partial disability award. *See* AB 14-15 (citing *Sulgrove*, 1989 WL 164574 at *3). However, the Board did not hold in *Sulgrove* that administrative delay is a basis to grant a worker benefits the worker would otherwise not be entitled to receive. *See id.* Rather, it simply observed that a worker should not be denied benefits solely as a result of administrative delay. *See id.* Here, the Department denied Stone a permanent partial disability award for his knee injury claim because it concluded that that injury, in conjunction with the back injury, produced permanent total disability rather than permanent partial disability. The Department did not deny Stone a permanent partial disability award as a result of administrative delay.

Stone has failed to prove that the Department improperly delayed closing his knee claim. Although Stone emphasizes that the evidence shows that his right knee condition was fixed and stable as of 2007 (AB 14), there is no evidence that any doctor offered this opinion to the Department on or about 2007. Rather, it appears that the Department was first made aware of this opinion at some time in late 2008. *See* CABR Kieras 14-15; CABR, Ex. 1. Given the complexity of Stone's claims, which involved a right knee injury, a low back injury, and psychological disability, it is reasonable to expect that some time was necessary to

determine whether Stone was permanently and totally disabled, and, if so, whether this was due to one of his injuries or a combination of the two.⁸

As the *Hollingsworth* case shows, one cannot assume that the Department has improperly delayed claim closure based solely on evidence that one of the worker's injuries became fixed and stable before both claims were closed with a combined effects pension, because the Department cannot properly close a claim until it has resolved both the medical and vocational issues that are associated with it. See *Hollingsworth*, 1998 WL 775364 at *3. The record in this case contains no convincing evidence of any improper administrative delay on the Department's part.

Stone also makes the unsupported statement that the Department resolved all issues regarding his knee condition by paying him time-loss compensation on the back claim alone effective 2007. AB 21. However, there is no evidence that the Department intended for its order paying Stone time loss on his back claim to resolve any of the vocational issues related to the knee, nor is there any legal support for the idea that paying

⁸ Furthermore, as the Supreme Court noted in *Tollycraft Yachts Corporation v. McCoy*, 122 Wn.2d 426, 439, 858 P.2d 503 (1993), "...brevity is itself not necessarily a virtue, nor always favorable to the injured worker".

time loss on one of a worker's claims resolves all vocational issues related to the worker's various claims.⁹

3. RCW 51.32.060(4) does not support Stone's contention that he is entitled to an additional permanent partial disability award for his knee injury

Stone contends that the plain language of RCW 51.32.060(4) shows that he is entitled to an additional award of permanent partial disability for his knee injury claim in addition to receiving permanent total disability benefits under both the knee claim and the back claim. AB 10. He claims that "the statute cannot be clearer" on that point. AB 10.

However, RCW 51.32.060(4) does not support that conclusion. It states:

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.

⁹ A Department order that grants (or denies) a worker temporary and total disability benefits under a given claim over a given set of dates is, by definition, a decision only with regard to the worker's right to temporary and total disability benefits during the dates listed in that order. See *In re Mark Billings*, BIIA Dec., 70,883, 1986 WL 31854, *2-*3. (1986). Thus, a decision to grant a worker temporary and total disability compensation under a given claim over a given set of dates has no impact on the worker's eligibility for benefits for any period of time that was not governed by that order. Here, the Department's decision to pay Stone time-loss compensation at various times on one of his claims is binding only with regard to his eligibility for that benefit at those times, and has no relevance to whether his permanent total disability, as of the date that he was placed on a combined effects pension, was due to one of his injuries or if it was due to both of them. Moreover, it is a verity on appeal that Stone's permanent total disability was proximately caused by both of his injuries.

RCW 51.32.060(4) states that the payment of a permanent partial disability for a prior injury does not preclude the worker from receiving a pension if the worker suffers a further accident that results in permanent total disability. However, it neither explicitly nor implicitly addresses whether a worker who is permanently and totally disabled as a result of the combined effects of two different injuries can receive an additional award of permanent partial disability for one of those injuries in addition to receiving a pension. *See* RCW 51.32.060(4). Thus, it does not resolve the question raised by this appeal.

Here, the Department did not attempt to do what RCW 51.32.060(4) clearly forbids; i.e., it did not withhold pension benefits from Stone based on the fact that he had previously been provided with a permanent partial disability award under his knee injury claim. Rather, it declined to award him additional permanent partial disability for his knee claim as well as a pension for the combined effects of the knee injury and the back injury. In doing so, it did not violate RCW 51.32.060(4).

Stone also argues that it would render RCW 51.32.060(4) “meaningless” to hold that a worker who is permanently and totally disabled due to the combined effects of two different injuries cannot receive a permanent partial disability award for either of those injuries.

AB 19-20. However, such an interpretation of the law would hardly render RCW 51.32.060(4) meaningless.

First, it must be noted that what RCW 51.32.060(4) most clearly states is that a worker's receipt of a prior permanent partial disability award does not preclude a worker from subsequently receiving a pension. The Department's interpretation of RCW 51.32.060(4) does not disturb that rule of law.

Second, under the Department's interpretation of the law, a worker who is permanently and totally disabled due to one injury alone would still be eligible for permanent partial disability awards for his or her injuries that were "pending" at the time that the worker was granted a pension and which were not proximate causes of the worker's total disability. Therefore, accepting the Department's interpretation of the law on this issue would not render RCW 51.32.060(4) meaningless.

4. *Clauson* and *McIndoe* support the Department, not Stone

Stone argues that *Clauson* and *McIndoe* support the conclusion that a worker may receive an additional award of permanent partial disability—as well as an award of a pension—regardless of whether the worker's permanent total disability was proximately caused by the combined effects of two injuries. *See* AB 12-13, 15-19 (citing *McIndoe*,

144 Wn.2d 252; *Clauson*, 130 Wn.2d 580). However, neither *Clauson* nor *McIndoe* considered the question of whether a worker who is permanently and totally disabled as a proximate result of the combined effects of two injuries may also receive an additional award of permanent partial disability. *McIndoe*, 144 Wn.2d at 254; *Clauson*, 130 Wn.2d at 585-86. Moreover, to the extent that those cases address that issue, their discussions strongly imply that such workers would not be eligible for additional permanent partial disability awards. *See McIndoe*, 144 Wn.2d at 254; *Clauson*, 130 Wn.2d at 585-86.

In *Clauson*, a worker injured his right hip in 1974. *Clauson*, 130 Wn.2d at 582-83. The right hip claim was closed in 1980 with a permanent partial disability award. *Id.* In 1983, the claimant suffered a second injury, this time to his low back and left hip. *Id.* In 1987, while the second injury claim was still open, the right hip injury claim was reopened. *Id.* The Department later closed the second injury claim in 1989 with an award for permanent total disability. *Id.* The Department then closed the right hip claim two months later, and declined to award any further permanent partial disability because the worker had already been placed under a pension for his separate, and unrelated, injury claim. *Id.*

The Department argued that *Harrington v. Department of Labor & Industries*, 9 Wn.2d 1, 7-8, 113 P.2d 518 (1941); *Sorenson v. Department of Labor & Industries*, 19 Wn.2d 571, 577-78, 143 P.2d 844 (1943); and *Peterson v. Department of Labor & Industries*, 22 Wn.2d 647, 651, 157 P.2d 298 (1945), showed that if a worker has been placed on the pension rolls, the worker is ineligible for any further awards for permanent partial disability for any other injuries. *See Clauson*, 130 Wn.2d at 585-86.

However, the Court rejected this argument, concluding that the *Harrington*, *Sorenson*, and *Peterson* cases were distinguishable. *Clauson*, 130 Wn.2d at 586. In *Harrington*, *Sorenson*, and *Peterson*, the worker was seeking benefits for an injury that occurred after the worker was placed on the pension rolls. *See id.* The worker in *Clauson*, on the other hand, sought a permanent partial disability award for an injury that occurred before the injury for which he received a pension, and “*which was pending at the time he was classified as permanently totally disabled.*” *Id.*

Since the worker was seeking a permanent partial disability award for a *prior* injury in a separate claim that was pending at the time he was classified as permanently totally disabled, the Court saw no reason to deny the worker a permanent partial disability award for the first injury. *Clauson*, 130 Wn.2d at 586. Implicit in the Court’s analysis is the idea

that the first injury was unrelated to the worker's permanently and totally disabled status. *See Clauson*, 130 Wn.2d at 586.

Here, in contrast, the Department considered the effects of both the knee injury and the back injury when it awarded Stone a pension, and it awarded Stone a pension under both of those claims, not simply under the back injury claim. Thus, Stone is not seeking a permanent partial disability award for an injury that is "unrelated" to his permanent total disability award, and *Clauson* does not apply to him. *See Clauson*, 130 Wn.2d at 585-86.

In *Maupin*, the Board expressly noted that the *Clauson* case was distinguishable, because *Clauson*, unlike the *Maupin* case, did not involve a combined effects pension but, rather, a worker who was permanently and totally disabled due to one injury alone, and who was permanently and partially disabled due to a previous, and entirely unrelated, injury. *Maupin*, 2005 WL 3802581 at *2-*3.

McIndoe, similarly, is readily distinguishable from the current case, and, therefore, it does not support Stone's arguments. *See McIndoe*, 144 Wn.2d at 254, 263. Furthermore, *McIndoe* makes comments, albeit in dicta, that strongly imply that workers who are situated as Stone is are not eligible for additional awards of permanent partial disability. *See id.*

McIndoe was a consolidated case involving three injured workers with broadly similar factual circumstances. *McIndoe*, 144 Wn.2d at 254-56. Each of the three workers suffered an industrial injury and were ultimately awarded a pension under that injury claim alone. *Id.* Each of the three workers later filed claims for occupational hearing loss, and sought permanent partial disability awards under those hearing loss claims. *Id.* Although the hearing loss claims were filed after the workers were placed on pensions, the injurious noise exposure that caused those workers to develop occupational diseases occurred well before the workers were placed on pensions. *Id.* There is no indication that occupational hearing loss was a factor in any of those workers becoming permanently and totally disabled. *Id.*

The Department denied these workers' claims for permanent partial disability because the hearing loss claims were closed after the date the workers were placed on pensions. *Id.* at 258. The Supreme Court reversed, stating that "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 pension claim." *McIndoe*, 144 Wn.2d at 263.

Here, the Department does not argue that Stone is ineligible for a permanent partial disability award based on the timing of the filing of his

two claims. Rather, the Department adjudged Stone to be totally, rather than partially, disabled as a result of both the knee claim and the back claim, and, as he failed to effectively rebut this determination, he may not receive a further permanent partial disability award under either claim.

The *McIndoe* opinion, far from requiring this Court to rule in Stone's favor, supports the conclusion that Stone is not eligible for a further award of permanent partial disability for his knee injury. *McIndoe*, 144 Wn.2d at 254, 263. In ruling that the workers were eligible for permanent partial disability awards for their hearing loss claims, the *McIndoe* Court emphasized the fact that the hearing loss claims were unrelated to the worker's permanent total disability. *See id.* at 254, 263. This suggests that an opposite ruling would be appropriate where, as here, the claim for which the worker seeks a further permanent partial disability award was a proximate cause of the worker's permanent total disability.

Indeed, in the opening paragraph of its opinion, the *McIndoe* Court stated that, "We affirm [the awards of additional permanent partial disability] on the basis that the hearing losses were sustained before the unrelated injuries that resulted in pension and the [hearing loss] claims were filed within the statute of limitations." *Id.* at 254. Thus, the fact that the claim for which the worker sought permanent partial disability was "unrelated" to the worker's permanent total disability was expressly

identified as a “basis” for the Court’s ruling that payment of permanent partial disability was proper. *Id.*

Furthermore, the *McIndoe* Court made another statement (in the course of rejecting one of the Department’s arguments), that supports the conclusion that Stone is not entitled to an additional award of permanent partial disability. *See McIndoe*, 144 Wn.2d at 263-64. The Department argued that if the Court ruled that the workers in this case could receive permanent partial disability awards in addition to their pensions, then it would follow that all workers who are eligible for pensions, including workers who only suffered one industrial injury, could also receive contemporaneous permanent partial disability awards, which would clearly be an anomalous result. *Id.* In response to that argument, the *McIndoe* Court stated that, “This is not the case,” thereby indicating that a worker cannot receive both an award of permanent total disability benefits and an award of permanent partial disability for the same injury. *Id.*

After noting that it is “not the case” that a worker could receive a pension and an additional award of permanent partial disability at the same time under the same claim, the *McIndoe* Court went on to discuss whether the Department could recoup any of the *prior* payments of permanent partial disability that might have been made before the worker was placed on a pension. *See id.* at 263-64. The Court explained that the

Department's ability to recoup any of the worker's *prior* awards of permanent partial disability depended on whether the claim for permanent partial disability was related or unrelated to the worker's permanent total disability. *McIndoe*, 144 Wn.2d at 263-64. It stated:

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 originally classified as partially disabling is later determined to cause permanent and total disability, earlier payments [of permanent partial disability] 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 pension claim.

In this case, Stone's knee injury was "originally classified" as only producing partial disability. The Department later "reclassified" both the knee injury and the worker's back injury as a combined effects pension. When the analysis that was employed in the *McIndoe* opinion is applied to the facts of this case, the strong implication is that Stone is not eligible for a further award of permanent partial disability for his knee claim because that injury was "reclassified" as a component of a combined effects pension claim. *See McIndoe*, 144 Wn.2d at 263-64.¹⁰

¹⁰ *McIndoe* also suggests that the permanent partial disability that Stone was previously provided for his knee injury is subject to recovery from Stone's pension under former RCW 51.32.080(4) (2007). *See McIndoe*, 144 Wn.2d at 263-64. However, if a "first instance" calculation is applied to the permanent partial disability that was awarded

5. **The legislature's amendments to RCW 51.32.080(4) clarify that if a worker is permanently and totally disabled as a result of the combined effects of multiple claims, then the worker is not eligible for a further award of permanent partial disability for any of the claims that proximately caused the worker's permanent total disability**

In 2011, the legislature passed House Bill 2123, a bill that amended several sections of the Industrial Insurance Act, including the sections that relate to permanent partial disability benefits.

EHB 2123 amends RCW 51.32.080(4) as follows¹¹:

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

to Stone in 2000, then no amount would actually be recoverable, because the pension benefits that Stone would have received had he been awarded a pension in the "first instance" (i.e., 2000) exceeds the permanent partial disability that he was awarded at that time. *See* former RCW 51.32.080(4) (2007).

¹¹ The Department has underlined the language that the amendment added to the statute, and "struck-through" the language that it deleted from the statute.

provisions of this subsection apply to all permanent total disability determinations issued on or after July 1, 2011.

Laws of 2011, ch. 37, § 401.

An amendment to a statute may be given retroactive effect if the amendment is “curative”; i.e., if it clarifies an ambiguous statute. *See Tallerday v. DeLong*, 68 Wn. App. 351, 358-59, 842 P.2d 1023 (1993). EHB 2123 amends RCW 51.32.080(4) in some ways that are curative (and, thus, that may be applied retroactively) and it also amends it in some ways that are not curative (and, thus, that may not be applied retroactively).

Two of the amendments EHB 2123 makes to RCW 51.32.080(4) are not curative. First, the amendment eliminates the “first instance” rule. As noted previously, the “first instance” rule limits the Department’s ability to recover a worker’s *previous* permanent partial disability benefits from the worker’s ongoing pension benefits. The elimination of the “first instance” rule makes the entirety of a worker’s permanent partial disability award subject to recovery if the worker is later placed on a pension. Second, the amendment eliminates the cap that the former version of the statute placed on the amount that could be deducted from a worker’s ongoing pension benefits.

These two changes to the language of the statute are substantive changes: they did not cure any ambiguity in the statute. Therefore, those two changes to the statute are inapplicable to Stone. Thus, the Department's ability to recoup Stone's *previous* permanent partial disability awards is subject to a "first instance" calculation, which, as noted, effectively means that no amount of his *prior* permanent partial disability awards are subject to recovery.

However, the amendment to the statute also clarifies it in a way that is curative: it clarifies that a worker may be awarded permanent total disability benefits under *multiple claims*, and, if a worker has been awarded permanent total disability benefits under multiple claims, then *all* permanent partial disability benefits that have been paid to the worker under any of the claims for which the pension is awarded are subject to recovery under RCW 51.32.080(4).¹² Since this aspect of the amendment is curative, it may be applied retroactively to Stone's claim. *See Tallerday*, 68 Wn. App. at 358-59.

In *Tallerday*, the court concluded that an amendment to RCW 51.24.030 was "curative" because it resolved an ambiguity in a

¹² Notably, Stone appears to dismiss as an absurdity the idea that the legislature could possibly have intended for a worker who is permanently and totally disabled due to the combined effects of two injuries to have all of the prior awards of permanent partial disability that led to that status subject to recovery. However, EHB 2123 amends RCW 51.32.060(4) in a fashion that compels the conclusion that that is precisely what it intended.

former version of that statute. *Tallerday*, 68 Wn. App. 358-59. Specifically, the court noted that the former version of the statute was ambiguous as to whether it allowed the Department to share in a worker's recovery if the worker received a settlement for a malpractice action that was brought against an attorney that the worker had retained to pursue a tort action against a third party who was allegedly responsible for the worker's workplace injury. *Id.* The statute was amended in 1986, and, as amended, it plainly allowed the Department to share in malpractice recoveries. *Id.* *Tallerday* concluded that the amendment was curative because it resolved an ambiguity that existed in the former version of the statute. *See id.*

Similarly, the former version of RCW 51.32.080(4) was ambiguous as to whether it applied to workers with "combined effects" pensions. On the one hand, the statute's broad reference to situations where "permanent partial disability compensation is followed by permanent total disability compensation" would, logically, include a situation in which a worker receives a permanent partial disability award under one claim and later receives a combined effects pension under both that claim and a second claim. However, the former version of the statute did not expressly state that this was so, and, therefore, it was ambiguous.

EHB 2123 resolved this ambiguity. It amended the statute to state that recovery may be made for any prior permanent partial disability that was awarded on any of the prior claims for which the worker ultimately received a pension. When an amendment resolves an ambiguity that existed in a former version of the statute, it may be reasonably inferred that the amendment was curative. *See Tallerday*, 68 Wn. App. at 358-59.

Given the legislature's plainly expressed intent to make all previous payments of permanent partial disability subject to recovery when a worker becomes permanently and totally disabled as a result of multiple injuries, it would be anomalous to hold that a worker who is permanently and totally disabled as a result of multiple injuries may receive a combined effects pension and may also receive an additional award of permanent partial disability for one of those injuries at the same time. From a common sense standpoint, it would be absurd to, simultaneously, place a worker on the pension rolls, grant the worker an additional award of permanent partial disability for one of the injuries under which the pension was being administered, and then begin recouping all of the worker's permanent partial disability benefits out of the worker's ongoing pension benefits.

Furthermore, as noted previously, the *McIndoe* Court stated that it is "not the case" that a worker who receives a pension may simultaneously

receive an additional award of permanent partial disability for the same injury. *McIndoe*, 144 Wn.2d at 263-64. In support of this conclusion, the *McIndoe* Court cited to the former version of RCW 51.32.080(4) (2007) and to the current version of RCW 51.32.060(4). *Id.* Thus, the *McIndoe* Court strongly implied that when a worker's *prior* permanent partial disability payments would be subject to recovery under RCW 51.32.080(4), it follows that it is "not the case" that the worker can receive any additional permanent partial disability concurrent with the award of permanent total disability benefits. *See id.* Since the amendment to RCW 51.32.080(4) clarifies that all of the permanent partial disability that was awarded under any of the claims that led to the worker's permanent total disability are subject to recovery, it follows that a worker who is permanently and totally disabled due to the combined effects of those injuries may not receive any additional permanent partial disability under any of those claims.

6. The liberal construction doctrine does not justify ignoring the well-settled principles that preclude a worker from receiving a combined effects pensions as well as an additional award of permanent partial disability

Stone attempts to bolster his argument that the Department erred when it denied him a further award of permanent partial disability by relying on the doctrine of “liberal construction.” AB 17-18. In that regard, Stone appears to argue that the liberal construction doctrine requires this Court to construe any ambiguity in the Supreme Court’s *McIndoe* and *Clauson* opinions in the light most favorable to him. AB 17-18. The doctrine of liberal construction does not support this argument.

While it is true that the *provisions of the Act* are “liberally construed,” this rule of construction does not authorize an interpretation of a statute that produces strained or absurd results that defeat the plain meaning and intent of the legislature. RCW 51.12.010; *see Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992); *Senate Republican Campaign Comm. v. Pub. Disclosure Comm’n of State of Wash.*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997). Furthermore, there is no support for the idea that this Court should apply the liberal construction doctrine to its interpretation of Supreme Court opinions.

Here, no provision of the Act implies that a worker may receive both an additional award of permanent partial disability and a pension at the same time and under the same injury claim. There is also no provision of the Act that implies that a worker who is permanently and totally disabled due to the combined effects of more than one injury may receive an increased award of permanent partial disability for one of the injuries for which the worker received a pension. As no provision of the Act supports his claim, the liberal construction doctrine, standing alone, cannot create such an entitlement. *See Senate Republican Campaign Comm.*, 133 Wn.2d at 243.

B. In The Alternative, If This Court Concludes That Stone Is Not Precluded From Receiving A Permanent Partial Disability Award Under Current Law, The Court Should Expressly Limit the Scope Of Its Holding To Cases Involving Workers Who Were Pensioned Before The Effective Date of EHB 2123

As noted above, existing law precludes a worker from receiving both a combined effects pension and an additional award of permanent partial disability for one of the injuries that proximately caused the worker to become permanently and totally disabled. However, in the event that this Court concludes that existing law does not foreclose such a benefit, the Department requests, in the alternative, that this Court expressly limit the scope of its decision to workers who were placed on a pension prior to July 1, 2011, the effective date of EHB 2123.

EHB 2123 amends RCW 51.32.080(4) by referencing workers who are placed on a pension under more than one claim, and by indicating that when a worker is placed on a pension under more than one claim, then all of the prior permanent partial disability awards that were made under those claims are subject to recovery.

A statute may not be interpreted in a way that leads to unrealistic, unlikely, or strained results. *See, e.g., Simpson Inv. Co. v. Dep't of Rev.*, 141 Wn.2d 139, 3 P.3d 741 (2000). An interpretation of RCW 51.32.080(4) that makes all *prior* permanent partial disability awards (on claims that led to the pension) subject to recovery, while, simultaneously, allowing the worker to receive a combined effects pension and an *additional* award of permanent partial disability for any of those claims would be strained, as this would lead to unrealistic and unlikely results.¹³

It is the Department's position that EHB 2123's amendment is curative to the extent that it references workers who are permanently and totally disabled as a result of multiple injuries, and that this is simply a

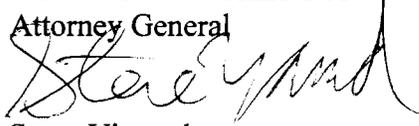
¹³ Furthermore, as noted, *Clauson* stated that it is "not the case" that a worker may receive an additional permanent partial disability award as well as a pension for the same claim, based on its reading of the former version of RCW 51.32.080(4). *Clauson*, 144 Wn.2d at 263-64. Since the amended version of RCW 51.32.080(4) references a worker who receives a pension under more than one claim, it follows that it is "not the case" that that statute allows a worker to receive an additional award of permanent partial disability for any of the claims for which the worker was awarded a pension.

clarification of, and not a change to, the law on that narrow issue. However, if this Court concludes that EHB 2123's amendment is not curative as to that issue, and is a substantive change to the law, then the Department respectfully requests that this Court expressly note in its opinion that the scope of its holding is limited to pensions that are not subject to EHB 2123; i.e., to workers who were placed on the pension rolls prior to July 1, 2011.

VII. CONCLUSION

For the reasons discussed above, the Department respectfully requests that this Court affirm the judgment of the superior court, which, itself, affirmed the decisions of the Department and the Board.

RESPECTFULLY SUBMITTED this 22 day of November, 2011.

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No. 67209-6-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

STEVEN J. STONE,
Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND
INDUSTRIES,
Respondent.

DECLARATION OF
MAILING

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date I mailed the Department's Brief of Respondent and this Declaration of Mailing to counsel for all parties on the record by and depositing a postage prepaid envelope in the U.S. mail, addressed as follows and by facsimile:

Robert A. Silber
Foster Staton
8204 Greenlake Drive North
Seattle, WA 98103-4413

DATED this 27 day of November, 2011, in Tumwater, WA.


DEBORA A. GROSS
Legal Assistant

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