SUPREME COURT NO.

COURT OF APPEALS NO. 69759-5-I

SUPREME COURT
OF THE STATE OF WASHINGTON

90304-2

THE BOEING COMPANY,
and
PATRICIA DOSS,

Respondents,

v.

DEPARTMENT OF LABOR AND INUSTRIES OF THE STATE OF WASHINGTON,

Petitioner,

ANSWER TO THE DEPARTMENT OF LABOR AND INDUSTRIES' PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is The Boeing Company ("Boeing"), a self-insured employer.

II. DECISION OF THE COURT OF APPEALS

A copy of the decision of the Court of Appeals, *Boeing Co. v. Doss*, 321 P.3d 1270 (Wash. Ct. App. 2014), was attached as Appendix A to the Department of Labor and Industries' ("Department") Petition for Review ("Petition").

III. COUNTERSTATEMENT OF THE ISSUE PRESENTED

Does RCW 51.16.120(1), which states that, when Second Injury Fund relief is granted, "a self-insured employer shall pay directly into the reserve fund *only* the accident cost which would have resulted *solely from the further injury or disease, had there been no preexisting disability*" require a self-insured employer to pay for the entire cost of treatment for a medical condition that did not result solely from the further injury or disease and that would not be necessary had there been no preexisting disability? *Id.* (emphasis added).

IV. COUNTERSTATEMENT OF THE CASE

For purposes of this Answer, Respondent Boeing adopts as its Statement of the Case the facts contained in the decision of the Court of Appeals, 321 P.3d 1270. Respondent notes that, contrary to the heading in

section IV. A. of the Department's Petition, Patricia Doss does not require lifelong medical treatment because of chemical exposure at Boeing. As the Department later correctly notes, "[b]efore her exposure at Boeing, Doss suffered from symptomatic asthma and was permanently restricted in her work as a result." Petition at 2 (citing Board of Industrial Insurance Appeals Record (BR) at 66-67). As the stipulated facts in this case reflect, "Ms. Doss requires ongoing treatment for her asthma *as a result of her pre-existing asthma* and the permanent aggravation of her asthma." BR at 67 (emphasis added). The Department's attempt to imply that Ms. Doss's need for treatment is solely the result of her chemical exposure at Boeing is wholly unsupported by the record.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

> A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b) This Court should deny the Department's Petition because the Petition does not meet any of these standards.

A. The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court, is not in conflict with another decision of the Court of Appeals, and this case does not involve a significant question of law under the Constitution of the State of Washington or of the United States.

As this case was one of first impression at the Court of Appeals and does not involve questions of law under the Constitution of the State of Washington or of the United States, the Department, correctly, does not argue that this case should be granted under RAP 13.4(b)(1)-(3). Therefore, review should not be granted on those bases.

B. The Department's Petition does not involve an issue of substantial public interest that should be determined by the Supreme Court.

The Department dedicates a scant two-and-a-half pages of its nineteen-page Petition to its argument that this case presents an issue of substantial public interest that should be determined by this Court. See Petition at 16-18. In those two and a half pages, the Department proffers three "issues" that it believes rise to the level of "an issue substantial public interest" requiring review by this Court. RAP 13.4(b)(4). None of these issues, in fact, is sufficient to necessitate such a review.

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1. The decision of the Court of Appeals furthers the underlying purposes of the Second Injury Fund, including worker safety.

First, the Department argues that the Court of Appeals decision does not encourage worker safety. The Department does so without citation to any evidence, in the record or elsewhere, that would support a conclusion that the decision of the Court of Appeals will make workers any less safe. *See* Petition at 16-17. Indeed, the Department's position is more accurately described as an argument against the very existence of the Second Injury Fund which, as this Court has noted,

> serves several underlying purposes. First, the fund encourages employers to hire and retain previously disabled workers, *providing that the employer hiring the disabled worker will not be liable for a greater disability than what actually results from a later accident*. Second, *by recognizing that an employer is only required to bear the costs associated with the industrial injuries sustained by its employees, the fund encourages workplace safety and prevents placing unfair financial burdens on employers*.

Crown, Cork & Seal v. Smith, 171 Wn.2d 866, 873, 259 P.3d 151 (2011) (emphasis added) (citing *Jussila v. Dep't of Labor & Indus.*, 59 Wn.2d 772, 778-79, 370 P.2d 582 (1962)). As the above shows, "by recognizing that an employer is only required to bear the costs associated with the industrial injuries sustained by its employees, the fund encourages workplace safety." *Id.* The decisions of the Superior Court and the Court of Appeals both properly require a self-insured employer to bear only "the

costs associated with the industrial injuries sustained by its employees" and therefore encourages worker safety. *Id.*

In addition, the Department's argument is based on a false premise; namely, that the decision of the Court of Appeals results in Boeing not "'bear[ing] the burden of the costs arising out of industrial injuries sustained by its employees.'" Petition at 16 (citing *Jussila*, 59 Wn.2d at 779). As the Department's own order states, "had there been no preexisting disability," RCW 51.16.120(1), Ms. Doss's chemical exposure with Boeing "would have resulted in an award of $22,237.07." BR at 77. Boeing did not and does not dispute that it should pay $22,237.07 and has, in fact, "submit[ed] a check payable to The Department of Labor and Industries in this amount" as ordered by the Department. *Id.* This amount is, by the terms of the Department's own order, "the costs arising out of industrial injuries sustained by" Ms. Doss. *Jussila*, 59 Wn.2d at 779). Any argument, either explicit or implied, that Boeing is attempting to evade paying that cost is unsupported and unsupportable.

2. The decision of the Court of Appeals does not "impose[] on the Department administrative and financing duties not contemplated by the Legislature."

Second, the Department states, again without the benefit of a citation, that the decision of the Court of Appeals "imposes on the

Department administrative and financing duties not contemplated by the Legislature." Petition at 18. The Department seems to argue that the Legislature has not contemplated that the Department will "evaluate[] whether particular medical bills fall within the authorized treatment and then pay[] the proper charges" when Second Injury Fund relief has been granted and the Department makes the discretionary decision to award continuing medical treatment under RCW 51.36.101(4). Petition at 17. The Department's argument that it is somehow incapable of performing these duties is unsupportable, particularly in the face of the plain language of RCW 51.36.010(4). That statute states that

> the supervisor of industrial insurance, solely in his or her discretion, may *authorize continued medical and surgical treatment* for conditions previously accepted by the department *when such medical and surgical treatment is deemed necessary* by the supervisor of industrial insurance to protect such worker's life or *provide for the administration of medical and therapeutic measures including payment of prescription medications.*

Id. (emphasis added). As the statute shows, the Legislature has contemplated whether the Department should "evaluate[] whether particular medical bills fall within the authorized treatment and then pay[] the proper charges" and has answered that question affirmatively. Petition at 18. In fact, the Department already administers numerous state-fund claims where Second Injury Fund relief has been granted and the

Department has made the discretionary decision to award continuing medical treatment under RCW 51.36.101(4). The Department's argument that it is somehow unable to provide the same administrative and financial duties to a small number of additional self-insured claims is in direct contrast to the intent of the Legislature, as expressed in the laws of this state.[1]

> *3. A minor increase in Second Injury Fund assessments to account for the rare instances where employees of self-insured employers are awarded post-pension, post-Second-Injury-Fund-relief, ongoing medical care does not rise to the level of "an issue of substantial public interest that should be determined by the Supreme Court."*

Third, the Department argues that "Second injury fund assessments will have to increase to account for post-pension medical treatment costs." Petition at 18 (citing WAC 296-15-225(1)). The Department fails to argue why such a change is unlawful or even negative. That the Department will

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[1] This is especially true in light of the fact that the Department actually *currently* administers some *self-insured* claims where Second Injury Fund relief has been granted and the Department has made the discretionary decision to award continuing medical treatment under RCW 51.36.101(4) because it has been ordered to do so by the Judicial branch. *See, e.g., Dep't of Labor & Indus. v. Boudon*, No. 00-2-05612-5KNT (King County Super. Ct., Wash. Dec. 15, 2012); *Healthtrust, Inc. v. Pamela A. Campbell-Fox*, No. 06-00251-5 (Skagit County Super. Ct., Wash. Apr. 22, 2008); *Prosser Memorial Hospital v. Janet E. Tull*, No. 06-00351-6 (Benton County Super. Ct., Wash. May. 1, 2008) (all unappealed judgments reversing the Board of Industrial Insurance Appeals and ordering that post-pension medical treatment be administered by the Department and paid for by the Second Injury Fund). This fact also casts serious doubt on the Department's uncited assertion that "[b]efore the Court of Appeals' decision, self-insured employers were responsible for administering and financing their employees' workers' compensation claims, including post-pension medical benefits." Petition at 6.

finally make, after being repeatedly informed that it has responsibility to provide ongoing medical care under RCW 51.36.101(4) when Second Injury Fund relief has been granted, *see supra* at fn. 1, the small increase to Second Injury Fund assessments necessary to account for that responsibility is in the public interest, not against it. The Department's belated decision will properly assign the responsibility of paying for such costs to self-insured employers as a group and insures that the Second Injury Fund will remain solvent, while also providing workers with necessary care in the rare instances when a worker with a pre-existing debilitating injury, employed by a self-insured employer, is subsequently injured to the extent that they become totally permanently disabled, the Department authorizes Second Injury Fund Relief, *and* the Department also authorizes continuing medical treatment under RCW 51.36.101(4). That the Department has not yet chosen to make such a change is not the fault of Boeing, but of the Department. It is difficult to ascertain how the Department believes that correcting its own failure to account for such costs up until the decision of the Court of Appeals constitutes "an issue of substantial public interest that should be determined by the Supreme Court" or is even an "issue" at all. RAP 13.4(b)(4).

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4. *Even if the "issues" raised by the Department were legitimate, because of the limited number of claims affected by the decision of the Court of Appeals, none of them constitute "an issue of substantial public interest that should be determined by the Supreme Court."*

Indeed, the Department fails to show how, given the small amount of claims implicated by the decision of the Court of Appeals, any of the above issues rise to the level of "an issue of substantial public interest that should be determined by the Supreme Court" RAP 13.4(b)(4). The decision of the Court of Appeals is only applicable in cases where the particular employer is self-insured, the employee has a pre-existing debilitating injury, the employee is subsequently injured to the extent that they become totally permanently disabled, the Department authorizes Second Injury Fund Relief, *and* the Department also authorizes continuing medical treatment under RCW 51.36.101(4). The number of cases that satisfy *all five* of these criteria is little more than a handful each year. The Department's attempt to improperly force Boeing to pay for ongoing treatment in such a limited universe of claims, even assuming *arguendo* that it has some legitimate basis to do so, is not "an issue of substantial public interest" that requires the intervention of this Court. RAP 13.4(b)(4).

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C. The Department's Petition should be denied because the decision of the Court of Appeals is correct.

Finally, this Court should decline review because the decision of the Court of Appeals is correct. The Court of Appeals weighed the arguments advanced before this Court by the Department in pages seven to sixteen of its Petition, addressed them, and found that "the unambiguous language of RCW 51.16.120(1), consistent with the purpose of the second injury fund, requires the Department, rather than the self-insured employer, to pay the costs of a disabled employee's ongoing postpension medical treatment." *Boeing Co. v. Doss*, 321 P.3d at 1275.

The Court of Appeals addressed the Department's argument that there is no "statute relieving [Boeing] of" the responsibility for paying ongoing post-pension medical treatment, Petition at 8, finding that RCW 51.16.120(1) "requires Boeing to pay only the costs necessitated solely by Doss's industrial exposure *and no more*. The Department makes no claim that Doss's need for postpension medical care resulted solely from chemical exposure at Boeing. Thus, Boeing cannot be required to pay for this care." *Boeing Co. v. Doss*, 321 P.3d at 1274 (emphasis added). The Court of Appeals addressed the Department's argument that application of the Second Injury Fund causes workers to be less safe by noting that "by recognizing that an employer is required only to bear the costs associated

with the industrial injuries sustained by its employees, the fund encourages workplace safety and prevents placing unfair financial burdens on employers." *Id.* at 1272 (footnote and internal quotation marks omitted). The Court of Appeals addressed the Department's argument that "[t]he pension reserve is not used to pay for the costs of medical treatment, nor is it funded to do so," Petition at 12, finding that Boeing "pays assessments for the second injury fund based, in part, on treatment costs. Including treatment costs as part of the total claim costs considered for the self-insured employer's assessments indicates that the legislature intended for the Department to pay from the second injury fund the costs of postpension medical treatment after it grants second injury fund relief." *Boeing Co. v. Doss*, 321 P.3d at 1274. The Court of Appeals addressed the Department's argument that its application of RCW 51.16.120(1) does not discriminate between state fund and self-insured employers, Petition at 12-13, finding that "[t]he Department's proposed result would impose a greater financial burden on self-insured employers." *Boeing Co. v. Doss*, 321 P.3d at 1275.[2] And the Court of Appeals addressed the Department's

[2] In support of this position, the Department states that "both [state fund and self-insured] employers are responsible for paying for the permanent partial disability resulting solely from the injury or exposure at their workplace either directly or as a charge to their experience rating" and that, for state fund employers, "costs [are] paid by the medical aid fund and charged against its experience rating." Petition at 13. The Department's position, for unknown and unarticulated reasons, omits the fact, which the Department recognized before the Court of Appeals, that, in practice, it is "unlikely that post-pension

argument that even if it does discriminate, that such discrimination is warranted, Petition at 13-15, finding that "the Department has presented no authority to support disparate financial treatment of self-insured employers" *Boeing Co. v. Doss*, 321 P.3d at 1275.[3] Indeed, the Court of Appeals considered all of the Department's arguments and properly rejected them. The Department's dissatisfaction with the Court of Appeals' rejection of its arguments is not listed at RAP 13.4(b) as grounds for this Court to accept review. Regardless, to the extent this Court considers the Department's argument to the contrary, this Court should decline review because the Court of Appeals correctly decided the issue presented.

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medical treatment would impact a state fund employer's experience rating." Supplemental Brief of Appellant at 5. That the Department, in advancing its argument, has chosen to ignore rather than confront this reality is unfortunate.

[3] The Department had ample opportunity to present authority supporting this position, if any existed, as the Court of Appeals called for and received supplemental briefing on the issue.

VI. CONCLUSION

Based on the foregoing points and authorities Respondent, The Boeing Company, requests that this Court deny the Department's Petition for Review.

RESPECTFULLY SUBMITTED this 23rd day of May, 2014.

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